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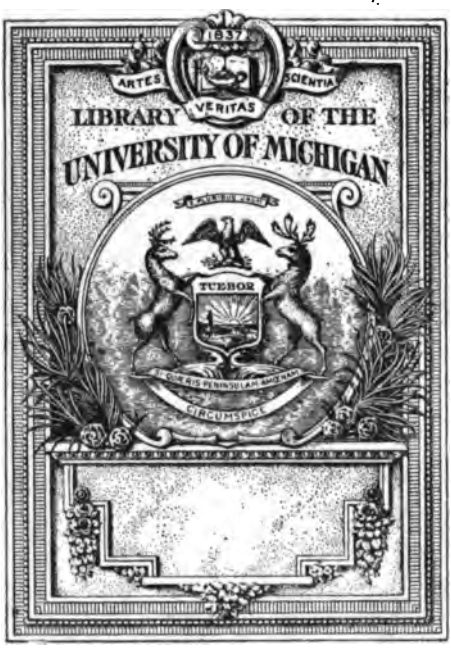
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Modern Legal Philosophy Series: Vol. X

# THE FORMAL BASES OF LAW

BY

GIORGIO DEL VECCHIO

*Professor of Philosophy of Law in the University of Bologna*

TRANSLATED BY

JOHN LISLE

*of the Philadelphia Bar*

WITH AN EDITORIAL PREFACE BY

JOSEPH H. DRAKE

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AND WITH INTRODUCTIONS BY

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AND

SHEPARD BARCLAY

*Former Chief Justice of the Supreme Court of Missouri*

BOSTON

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1914

THE MODERN LEGAL PHILOSOPHY SERIES

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X

# The Formal Bases of Law

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# GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than the English, and entertain a much

greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
>
> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fair-*

*mont Coal Co.*) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental masterworks on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present series is the result of these labors.

In the selection of this series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this series in their latest and most representative form. It is believed that the complete series will represent in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to English readers the most representative views of the most modern writers in jurisprudence and philosophy of law. The series shows a wide geographical representation; but the selection has not been centered on the

notion of giving equal recognition to all countries. Primarily, the desire has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time. Germany, for example, is represented in modern thought by a preponderant metaphysical influence. Italy is primarily positivist, with subordinate German and English influences. France in its modern standpoint is largely sociological, while making an effort to assimilate English ideas and customs in its theories of legislation and the administration of justice. Spain, Austria, Switzerland, Hungary, are represented in the Introductions and the shorter essays; but no country other than Germany, Italy, and France is typical of any important theory requiring additions to the scope of the series.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The series has been so arranged (in the numbered list fronting the title page) as to indicate that order of perusal which will be most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this series will measurably help to improve and to refine our institutions for the administration of justice

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# EDITORIAL PREFACE TO THIS VOLUME

By Joseph H. Drake [1]

## I. *The Author and the Translator.*

Giorgio Del Vecchio (born at Bologna, August 26, 1878) studied at the universities of Genoa, Rome and Berlin, obtaining in the University of Genoa his doctor's degree in the philosophy of law. In the year 1903 he was nominated professor of that subject in the University of Ferrara, where he began his teaching with the discourse "Right and Human Personality in the History of Thought." He occupied that chair till the end of 1906, giving also a course of lectures as docent in the University of Bologna during the years 1905 and 1906. In 1906 he was nominated for the professorate of the philosophy of law in the University of Sassari and remained there until the end of 1909. To this period belong, among others, the dissertation on "The Phenomenon of War and the Idea of Peace," which was read originally at the University of Sassari as an inaugural address of an academic year.

In 1909 Del Vecchio was called to teach in the University of Messina, which at that time was being re-established after the fatal earthquake of 1908. He was appointed in the first group of professors who offered themselves for the work of reconstruction, which had at that time a high moral and civil significance. From Messina, Del Vecchio returned finally at the beginning

[1] Professor of Law in the University of Michigan, and member of the Editorial Committee for this series.

of the year 1911. In this year he was nominated professor in the University of Bologna. He began his teaching in this university, where he still teaches, with the discourse "Upon Positivity as a Quality of Law."

Del Vecchio has participated in various international scientific congresses. Among others was the International Congress of Philosophy at Heidelberg, in the year 1908, reading there an article, "Upon the Conception of a Science of Universal Comparative Law." This has been published in Italian, German, French, Spanish, Portuguese and Roumanian. He belonged from the beginning to the "International Vereinigung für Rechts- und Wirtschaftsphilosophie" of Berlin, and represented Italy in the honorable council of that society. He likewise was a member from the beginning of the "Society of J. J. Rousseau," in Geneva, and he has had similar share in many scientific bodies, *e. g.*, "The Academy of Science of the Institute of Bologna," "The Accademia Peloritana of Messina," and others. He has the title of Professor Honorarius of the University of Ferrara, and is Corresponding Member of the National Committee for the History of the Italian Renaissance.

Several of his works have had the purpose, aside from that of translation, of communication to a foreign academy, as for example, the essay "Upon the Theory of the Social Contract" which was presented by the philosopher Emile Boutroux to the Institute of France (Académie des Sciences Morales et Politiques) at the sitting of July 20, 1907.

The translation presented in this volume in three parts was published in Italian in three separate volumes: the first appearing in 1905, under the title of "The Philosophical Presuppositions of the Idea of Law"; the second, in 1906, under the title of "The Concept of Law"; the third, in 1908, under the title of "The Concept of Nature

and the Principle of Law." "The Formal Bases of Law" has been chosen as the title for these combined volumes which form one connected work.[2]

[2] The other published works of the author are:

1. "L'evoluzione dell' ospitalità" (in "Rivista italiana di Sociologia," A. VI, Fasc. II–III). Roma, 1902.
2. Giordano Bruno (in "Rivista ligure," A. XXIV, Fasc. III). Genova, 1902.
3. "Il sentimento giuridico" (in "Rivista italiana per le scienze giuridiche," Vol. XXXIII, Fasc. III). Torino, 1902. Seconda edizione, 1908.
4. "L'etica evoluzionista." Nota critica (in "Rivista italiana di Sociologia," A. VI, Fasc. V–VI). Roma, 1903.
5. "La Dichiarazione dei diritti dell' uomo e del cittadino nella rivoluzione francese." Genova, 1903.
6. "Diritto e personalità umana nella storia del pensiero" (in "Rivista di Filosofia e scienze affini," A. VI, Vol. I, N. 3). Bologna, 1904.
7. "Il comunismo giuridico del Fichte." Nota critica (in "Rivista italiana di Sociologia," A. IX, Fasc. 1). Roma, 1905.
8. "Su la teoria del contratto sociale." Bologna, 1906.
9. "Sull' idea di una scienza del diritto universale comparato" (in "Bericht über den III Internationalen Kongress für Philosophie"), Heidelberg, 1909. Seconda edizione, Torino, 1909.
10. "Un punto controverso nella storia delle dottrine politiche." Nota critica (in "Rivista italiana di Sociologia," A. XIII, Fasc. V–VI). Roma, 1909.
11. "Il fenomeno della guerra e l'idea della pace." Sassari, 1909. Seconda edizione (in "Rivista di diritto internazionale," A. V, Fasc. I–II), Torino, 1911.
12. "Tra il Burlamachi e il Rousseau." Nota critica (in "Cultura contemporanea," A. II, N. 4). Ortona a Mare, 1910.
13. "La comunicabilità del diritto e le idee del Vico" (in "La Critica," A. IX, Fasc. I). Trani, 1911.
14. "Sulla positività come carattere del diritto" (in "Rivista di Filosofia," A. III, Fasc. I). Modena, 1911.
15. "Sui caratteri fondamentali della filosofia politica del Rousseau" (in "Rivista ligure," A. XXXIX, Fasc. V). Genova, 1912. Terza edizione, 1914.

Some of the publications above mentioned have been translated

The translator of the present volume, JOHN LISLE, is a graduate of the College and the Law School of the University of Pennsylvania, and a practitioner at the Philadelphia Bar. He is also the translator of the works of Miraglia and Vanni in the present series, and of Calisse's "History of Italian Law," in the Continental Legal History Series.

II. *The Formal Bases of Law.*

In paraphrase of a hackneyed apothegm, it may be well said that the thinking man is incurably philosophical. This desire to attain the final reason of things begins at the dawn of self-consciousness in the individual. Most of us as college boys experienced this intoxicating philosophic impulse, and the elevation of temperature consequent thereon brought with it an uplift of the spirit that some of us mistook for the birth of a new intellectual life. Then we felt we had reached, or at least were in sight of, an answer to Pilate's question, "What is truth?" The essence of things, the ultimate reality, was whatever for our time was the latest style of the "absolute," — that something which the thinking man could not help thinking, which was true for all times and in every place. This philosophic reality, which was with Plato ἰδέα, with Aristotle οὐσία, with Kant the "Ding an Sich," with Hegel the "absolute," appears in Roman law as "jus naturale," in medieval jurisprudence as the law of nature, and in later juristic thinking as the law of reason. With each successive emergence of this fundamental concept we seem to have reached the longed for

into various foreign languages: German, Spanish, French, Portuguese, Dutch and Roumanian. "Sulla positività come carattere del diritto" has been translated into English under the title of "Positive Right" (cf. "Law Magazine and Review," vol. XXXVIII, N. 308, May, 1913.)

finality. But on closer examination we find what is apparently only the old idea in a new garb, and in our disappointment we say we will have none of it; philosophy may be valuable as mental gymnastics, but brings nothing to aid in the solution of the practical problems of being or of doing.

This philosophic nihilism was characteristic of the best English juristic thought of the last half of the past century. The insufficiency of Benthamism and later types of English utilitarianism as an answer to the basic question of philosophy was plainly recognized, but the belief in experience as the only source and test of truth remained. Nevertheless an aggregate of individual experiences, no matter how large, can lead us only to the general, not to the universal, and it is some form of the universal that the eternal question calls for. Thus are we thrown back again on the something that transcends experience, that which exists prior to experience and which makes it possible. "Juridical thought is anterior to its concrete realization in law," (cf. § 104, in fine) and to the study of this transcendental concept the juridical thinkers of the present century have again turned.

Early in his treatment of the subject, Del Vecchio tells us that "necessity and universality are elements foreign to experience but understandable by reason" (§52), and to reason must we turn for an answer to the philosophic query. This universal element is what he calls the logical form, "forma dat esse rei," (§55, in fine) and this logical form, he says, "gives essence not existence." (§ 56.) In this assertion that form is the essence, we have apparently a reversion to the use of form as equivalent to the Aristotelian absolute (οὐσία), and as it is in this sense that the title of our translation uses the phrase "formal bases" as a paraphrase of "I presupposti

filosofici" of the Italian, we may profitably tarry on some consideration of the philosophic as contrasted with the popular use of the word "form." That there is a necessity for some elucidation of this word is self-evident. Del Vecchio says (§ 81) "no word is understood in so many ways as the word form"; though he himself holds consistently to the one connotation, namely, that form is the metaphysical and "a priori" essence of law, and the word "formal" has its philosophic meaning which has prevailed from the time of Aristotle. But in this sense, meaning "essential," it is the direct antonym of the popular use of formal, namely, non-essential or superficial. In this use of the words "form" and "formal" Del Vecchio is harking back to the οὐσία of Aristotle. The concept οὐσία (etymologically our word essence), the ultimate truth of Aristotle's system, was the analogue of Plato's ἰδέα. The distinction between the two concepts is for our purpose unimportant. The philosophic element common to the two is that each is held to be a true absolute, a truth that comes to us by virtue of our common intelligence, that which every man must think as of necessity. The type of this sort of truth is of course the mathematical axiom, and in the history of philosophy prior to Plato and Aristotle we have a mathematical absolute, that of number, in the philosophy of Pythagoras. When Cicero clothed Greek philosophy in Roman dress, we find that he used the word "forma" as a translation of these Greek absolutes ("De Orat." 10. "has rerum *formas* appellat ἰδέας Plato easque gigni negat et ait semper *esse* ac ratione et intelligentia contineri").

Medieval philosophy coined two participles from the classical "esse," namely, "ens" which appears in "entity" and "essens" from which comes "essential." The word "essentia" is constantly used throughout the Middle

Ages as the equivalent of the Aristotelian οὐσία, and appears in modern Romance languages with the same meaning as in English. It seems therefore that the primitive meaning of "formal" was "essential," and this has been preserved in philosophic and juristic thinking, while the use of "formal" in the popular speech as the antonym of "essential" is a derivative meaning and has developed at a comparatively modern period.

III. *Philosophy and Practice.*

Pound has shown (22 Yale L. J. 114) how the struggle for better definition of law has resulted in continually widening the practical application of law. In like manner it may be shown that the constant broadening of the metaphysical bases of law has been accompanied by improvements in its practice, and to this purpose we may well address ourselves. Supposing then that the above lucubrations do embody the truth, the question naturally presents itself, what of it — "cui bono practico?" Of what avail is philosophic thinking, past or present, for the busy lawyer or the puzzled judge with his pragmatic demands for results?

The question is as old as man itself; and philosophy has been struggling — successfully we may assume — for an increasingly better answer to it from the time of Socrates and the Sophists. Justice, according to the Sophists, is dependent on a purely arbitrary subjectivity. What is just for you may be unjust for me. Right on one side the mountains becomes wrong on the other. "Yes," says Socrates, "but there is in the community the ideal of the ethically normal, to which all good citizens should attempt to conform." The laws of the State embody this ideal, and the just man is he who obeys the laws of his State. The inadequacy of the answer appears on its face. But it marks a great advance

over the negation opposed to it. Each of us is to strive for a common ideal, and knowledge of this ideal is to be attained only by individual effort. Government thus becomes self-government. The end of government is the welfare of all the citizens and a government of law and not of men is established.

Plato's service was mainly in his refinement and development of the doctrine of the "idea." This idea, or perfect image, of justice is to be found, not as with Socrates in the average man with all his imperfections, but in the perfect type of the ethical elect. Although this narrows the scope of the idea of justice it increases its intensity, and within this more select circle Plato "recognizes popular conviction, the collective sense of right, as the source of justice."

In Aristotle we come for the first time upon a fully developed theory of natural law. Man by his very nature is a social being and the combination of men in political bodies forms a natural social unit, the State. But the concept of State existed prior to its practical realization, just as the concept of the whole exists prior to its parts. This natural law is in Aristotle's theory of jurisprudence the equivalent of the οὐσία or essence of his metaphysic; that is to say, it is Aristotle's formulation of the philosophic absolute, the necessary and unconditioned basis of law. Where is the man of action who would deny that Aristotle's philosophic theories have been devoid of practical results? During the Middle Ages the law of nature, divine in origin, was the only bulwark for the protection of the nations against the arbitrary caprice of pope or emperor. In the hands of Grotius it became the basis of the Law of Nations. In a perverted form of a return to nature it was made the justification of all the excesses of the French Revolution, and one of its fundamental dogmas, that of equality,

has been incorporated in many modern declarations of independence and bills of right, which simply reiterate the Aristotelian principle that "justice is equality." Nor has this influence been confined to the field of politics and public law. Sir Frederick Pollock well says that the law of nature under its modern name of the Law of Reason is still "the prevailing ideal of which it would be hardly too much to say that it is the life of the modern Common Law."

Probably no one is disposed to question the practical results of the pseudo-philosophic theory of utility as promulgated by Bentham and elaborated by his followers among the later English Utilitarians. To be sure it can hardly be classified as a juristic philosophy. It is rather simply a theory of legislation. But as such it gave a unifying principle, philosophic in character as a striving for unity, which constituted the "vis a tergo" of the reform movement of the last century. However mechanical or even grotesque the theory of utility was from a philosophic standpoint, no one can deny that its application to practical politics has resulted in refashioning large sections of our English law so far as that can be accomplished through the instrumentality of legislation.

The metaphysics of law went out of style on the Continent as well as in England in the middle of the last century. Properly so, we must assume. Savigny was right and his opponents were wrong. A knowledge of the detail of the history of European law and a comparison with the laws of other places and periods was an essential prerequisite to any effort at unification of legal principles or of any attempt to arrive at the underlying philosophic meaning of law. But philosophy had her revenge even on the great Savigny. He drove out the form of natural law with an esoteric content which was

in style at the beginning of his century. But even before he had reached the end of his life, philosophy had reconstructed a new natural law with an historic content out of the materials gathered by him in the course of his brilliant historical reconstruction of Roman Law.

With the end of the last century there has come a revival of idealistic philosophy on the continent. This has in the main taken the form either of a movement back to Kant or of a revival and extension of Hegelianism. Del Vecchio is classed as a Neo-Kantian, and the every-day lawyer may ask of him (as he has of his predecessors) what contribution he has made to the practical betterment of our complex legal situation.

Kantian philosophy has been described by one of its modern critics as "the last great uprising of rationalism in general philosophy and of the doctrine of 'natural law' in legal philosophy." In the metaphysical system of Kant the "Ding an Sich" is the modern analogue of the οὐσία of Aristotle. Each is a formal concept existing independently of experience and prior to any realization in experience. Kant's system of natural law has been freed from the trammels of the classical theory of natural law and appears in its modern form of a law of reason.

It is from this concept that Del Vecchio starts. "The law of equality of the radii governs before the circle is drawn." "Whoever builds a house does not thereby make its concept." These two sentences from Chapter X of Part I of this work (§ 77 and § 75) give the basis of the Kantian theory of law upon which Del Vecchio builds. It is worthy of note that they both go back to classical antiquity. The first is even pre-Socratic, as it involves the concept of number, *i. e.*, mathematical truth, which was the Pythagorean absolute. The second is manifestly the Platonic ἰδέα. The house

of brick and mortar which appears before our eyes is not the real house. The true reality is the *idea* of house that exists, as Plato says, in the mind of the god. The circle that we draw is only a copy of the true reality which is the mathematical concept of curved and continuous line, each point of which is connected by radii of equal length with the central point. The formal basis of law — here "formal" equals "essential" — is not found by generalization from any number of positive laws, no matter how large, but is a true universal, existing prior to experience and not conditioned by it. Del Vecchio gets away from the old natural law over to the law of reason in his proposition (§ 195) that "the eternal seed of justice, the foundation of the idea of law is not furnished by nature considered as the complex or succession of empirical facts but by the essence (or nature) of man, which comprehends and transcends other nature and is in itself autonomous." "The principle of law is therefore deducible 'a priori' from the nature of man." (Cf. Pt. III, Chaps. IV, V, post.)

What then are the practical bearings of this Neo-Kantian philosophy of law? First and foremost it is to be noted that it is true, or at least it possesses more of truth than do the older natural law theories or than is to be found in the empirical and positive theories that it supplants. If it is true, we need hardly go further. The Lord's truth will take care of itself, and men may be trusted to find a practical use for it. But we need not stop with this. The advocates of positive law assert that the essence of law is force, namely, that it is an emanation of the sovereign power. The historical school would apparently confine us to the quietistic course. We may observe what law has been and is but can scarcely have an outlook for the future. We must simply wait on the slow processes of history. But in

contrast to both of these, "a conception which goes beyond the phenomenology and empirical determination of action and finds its principle and norm in the intelligible essence of man" (§ 192) relieves us, on the one hand, from the dominance of arbitrary force and, on the other, gives us a hopeful program for the future. Law is neither force simply nor growth simply, but law is right reason, existing in the nature of man himself, and this reasonable law is to be worked out in the experience of mankind by an intelligent prevision under the control of a directive purpose, innate in the reason of man.

Here is its practical message for us. Possibly it is not the best formulation of the philosophic reality. The caustic criticism of some of the Neo-Hegelians, including their great leader, Kohler, would deny any significance to it. But surely, as Pollock says, the law cannot afford to throw away any of its resources. Here we have a broader formulation of philosophic theories than is found in any of the juristic predecessors of the Neo-Kantians, and this theory can be used as a formal basis from which a practical advance may be made.

# INTRODUCTION TO THIS VOLUME

By Sir John Macdonell[1]

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This volume contains the translation of three of the chief works of a distinguished, prolific and many-sided Italian jurist, some of whose works have been translated into several languages, and have exercised, and are exercising, no small influence. At certain points the three overlap. At several points they seem to touch many other questions and matters than those which fall within the philosophy of law even in the author's comprehensive view of it. In seeking firm foundations Professor Del Vecchio may seem to compass the whole field of philosophy. But there is a certain unity in all three works. They help to elucidate each other, and they deal instructively with fundamental questions of jurisprudence.

For some years there has been in Italy remarkable activity and interest in regard to those questions; a veritable juridical "Risorgimento"; activity which at first and for a time manifested itself in translations from German legal literature and in applications or restatements of the teaching of Kant or Hegel, but which, reverting to Vico, stimulated by Gioberti, Rosmini and other earlier native thinkers, and concerning itself at first hand with the great problems of jurisprudence, has of late produced a rich harvest of original investigators. All the workers in this field ask, and for the most part independently answer, questions which most English and American jurists pass over and the obtrusion of

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which they as a rule resent. Knowing comparatively little of a very large literature, I have no right to speak with much confidence of the general characteristics of these writers. It is enough to say that they are not compilers; that they do not in merely mechanical fashion collect facts and note similarities. They seek for the principles underlying these facts and their relation to other social phenomena; and they are concerned with the philosophy of law.

But can there be a philosophy of law? And if it is possible, in what sense does or can it exist? Will the residuum distilled after the evaporation of the particular and accidental elements be so small as to be unimportant? Can such a philosophy be constructed without reference to ethics and indeed to philosophy in the largest sense? Some of these questions I touched upon in a short Introduction to the translation of Berolzheimer in this series.

I will here merely add a few observations, especially with reference to Professor Del Vecchio's attempt to construct such a philosophy.

The modern Italian writers who have discussed these questions fall into two groups; those who deny the existence or possibility of a philosophy of law, and those who, otherwise differing infinitely among each other, hold the contrary. Miceli, Professor of law at Palermo, is a type of the former. In his view, "A true philosophy of law is not possible. What is presented as such either is not a true philosophy, but rather a mixture of empirical elements, or it is the philosophy of something else than that of law." ("Rivista Italiana di Sociologia," XVII, 336.) The conception of law is an empirical one, connected with the state of society at any given time. Law is a combination of elements varying according to practical exigencies. Philosophy quits its province, and becomes an intruder, a disturber and author of confusion,

when it enters the domain of law. The distrust of lawyers as to philosophy is justified. "They feel that the universal criteria of philosophers disturb those distinctions, those classifications, those categories which are for law practically indispensable, and are irreducible to universal conceptions." All which, if true, speaks of want of familiarity on the part of theorists with the subject-matter which they examine, but which is not inconsistent with the need and possibility of a really scientific analysis of the very diverse jural facts. It is merely saying that the philosophy of law has, too often, attracted writers ignorant of law or philosophy or both.

Next, as to those who in one form or other believe in the practicability of a philosophy of law. At present they fall into two groups: one the positive, the other vaguely described as the idealist. The one would treat law as a fact to be examined, just as are the economic facts of society. The other would recognize the existence of the ethical element, the ineffaceable distinction between what ought to be and what is. The latter group may be subdivided into the Neo-Hegelian class, represented by Kohler, and the Neo-Kantian, to which belongs the author here translated.

Del Vecchio's teaching, expressed more clearly than is usual with philosophical writers, is free from the heavy verbiage, not incompatible with superficiality, which is the characteristic of many writers on jurisprudence. With him, philosophy is not the art of making commonplaces obscure. Nor is his teaching based, as was the case with so many of his predecessors, merely upon a knowledge of Roman law or one or more modern systems. He would found his generalizations upon all the facts of jurisprudence. He is, therefore, a student of comparative law in its widest sense and fully recognizes its value as a storehouse of experience. But he insists

— it is a distinctive note of his teaching — that there is, and must be, in jurisprudence, an element not derivable from experience. "As long as we consider human acts in their empirical aspects, as they enter into the causal succession of objective nature, we shall be able at most to trace the course of history, but never to create a philosophy" (§168). "Ethical valuation deals with an essentially metaphysical relation, and is only possible where it is based on a criterion which transcends phenomena" (§171).

And here let me say as to these diverse opinions that, with several authors in my mind who have discussed the philosophy of law, I cannot but think that much of the controversy is a battle in which shadows fight with shadows; one in which friend and foe are indistinguishable; in which vague statements are repelled by others equally vague; in which metaphors often serve for arguments; a battle, it may be added, arising to some degree from misunderstanding. There is a common ground on which the combatants might meet. Even those who hold, with Miceli, that there is not and cannot be a true philosophy of law, admit that there may be "an empiric superior science of law, a general consideration of all legal systems." They would admit what is sometimes called a phenomenology of universal law; an orderly and brief statement of the common qualities and incidents of all law. Further, even they who challenge the possibility of a philosophy of law must recognize the existence of questions not solved by systems of "Allgemeine Rechtslehre" or indeed any scientific exposition of facts (see § 80). Those who with our author attempt to construct a philosophy of law seek to satisfy an imperious need — "the ethical need" as it is sometimes called — the demand for something different from the mass of historical dissertations and investigations

which, if they elucidate the past, too often serve to obscure present and future needs. When facts have been collected and arranged, when their common elements have been extracted, we are brought into the presence of a problem which experience cannot solve. It is not enough to know that such and such is commanded, such and such forbidden. We do and must ask, Why? We do and must endeavour to distinguish between the quality of certain commands and rules and that of others.

This "ethical consideration of the social life" is a necessity. There is a conviction, true or false, but ineradicable, assuming many forms but never at any time wholly absent, that there is attainable or desirable an order of things better than that which exists — in other words, a "sittliche Weltordnung," — and that this order can be furthered or retarded by the operation of law. The sentiment of justice is as real a fact as the existence of electricity. By that ideal actual laws are judged. Cling as we may to the facts of experience, we shall be compelled to judge the facts by a standard not derived from that experience. And here it may be remarked that our author does good service in rebuking and confuting the legal Pyrrhonism which dwells upon the variety and accidental elements in law, to the exclusion of consideration of common features. "The modern studies, by whose light the variety in the forms of life and the differences according to time and place of both men and nations are more clearly seen, have shown with equal clearness that there are deep-rooted similarities and continuous analogies, and even true and actual equalities of principle and institutions among various people in different ages." Impartial reflection reveals beneath many differences a common substratum, — which Vico calls "the definite common mind of the nations"; an element which brings about the progressive unification of law and a

tendency to co-ordinate law and institutions. No doubt, it is hard to detect the common elements in systems apparently, and sometimes really, very unlike. But what is a source of difficulty for science does not cease to exist in reality; "and it is a vain illusion to ignore a need because we cannot satisfy it" (§ 14).

In my brief Introduction to the translation of Berolzheimer, in this series, I pointed out that there were at least five tasks to be performed.

The first task is to trace the origin of law to its sources in human nature; in which task the psychologist and jurist must co-operate, and in which Wundt, Ihering and many others have had their share. This is a theme touched upon, though imperfectly dealt with, by our author in certain sections; for example, in § 134, where he remarks: "Law is by its nature a vital force and as such dominates the wills of those subjected to it, but its realization is not always mechanical. Psychological coercion is as effective as the physical."

In the second place, it is some one's business — and whose if not the philosophic jurist's? — to connect law with the society and circumstances in which it originated; to seek to put legal phenomena into their true relationship with the other phenomena of society — for example, with economic facts. That all social facts are related; that there is no isolation; that they form a whole; that they interlock and interact; that they are not fortuitous; that they may not form an organism, but that they form a system, we all admit. That relationship or system is as much a matter of scientific inquiry as are the individual facts themselves. This is an inquiry in which aid is received from the economist and the sociologist; an inquiry for the first time rendered possible during the last twenty-five years, by reason of the accumulation and accessibility of materials.

The next task is to analyse the ultimate elements of law; in particular to realise fully the true nature and varieties of sanction. A further task is to state the laws of the growth of jurisprudence, what Leibniz calls the "historia mutationum legis," to determine whether there is evolution or mere accumulation or addition; to inquire into the evolution of progressive legal systems.

In the next place, it is legitimate to inquire what are the internal impulses which produce law; in other words, the psychology of law.

The last task is to discriminate between law and ethics.

As to all these points, our author gives assistance. But as to all of them, I note sometimes certain defects; for example, occasionally a certain cloudiness of phrase; a proneness to lose touch with reality; perhaps also hesitation in drawing the full conclusions from his own reasoning. He is right in protesting (§ 139) against Ihering's attempt to fix or define the universal object of law. On the other hand, he himself seems to me to limit the field of law too much; there are facts not to be ignored by jurisprudence which do not fall within his formula.

In my Introduction to the translation in this series of Berolzheimer's Philosophy of Law, I remarked that there is a philosophy or spirit of law deeper than that of Montesquieu. He did much to get beneath the surface of law; to trace its relationship to other phenomena; to show that mere legal analyses was imperfect; that, all parts of national life being united to each other, all parts of law originating in that life were related also. I am inclined to think that this volume penetrates deeper. It seeks to find the roots of law in human nature and not merely in external facts and the social "milieu."

The book is also to be welcomed as a protest against "the excess of philosophical reaction." Such words as these are opportune: "The demand for a new basis of

jurisprudence is largely unanswered, while philosophical doubt, which is so obvious a mark of it, increases. The multiplication of historical studies, increasing the data, shows more clearly every day the need of giving more weight to speculative and dialectic studies."

I cannot sum up in a sentence or two the merits of the volume. But to my mind its great service is twofold. It is a contribution to what is in jurisprudence the theme of themes, the History of Justice; to that book, yet unwritten which describes the growth of that sentiment in ethics and in law. The second service is that the book prepares the way for a true Natural Law based upon the common elements and need in men's nature and independent of group morality.[2] Held for centuries by jurists as the basis of their teaching and their science, and despised as mere "fustian" by Bentham and Austin, Natural Law reappears in a new form; with new arguments, not open to the old objections, it is put forward by recent writers. No one holds that there is one law everywhere to be found; that is now an obviously untenable fiction. But there are ethical criteria which are applied to all laws; there are ever-present needs; and attempts to satisfy them produce in similar circumstances similar results.[3]

To quote a distinguished countryman of Del Vecchio, Professor Carle:[4] "Nel diritto occorre un elemento immutabile, costante, universale, che é rappresentato dall' idea del giusto, ed un elemento mutabili, particolare, transitorio, che é rappresentato dai fatti contingenti, a cui il diritto deve essere applicato. In esso vi ha un elemento unificatore, che é l'idea del giusto, ed un elemento che direbbesi diversificatore, il quale consiste nelle speciali contingenze, a cui deve proporziarsi e deve accomodarsi quest unica idea."

[2] I am not forgetting Herbert Spencer's work.

[3] See Hobhouse, I, 274.

[4] "La vita del diritto," p. xxxvii.

# INTRODUCTION TO THIS VOLUME

By Shepard Barclay[1]

It is a pleasure no less than an honor to be among those who have the privilege of introducing the following writings of Professor Del Vecchio to Anglo-American readers. My allies, in the other introductions, have given from several view-points such interesting outlines of the life and writings of our author that my effort may be abbreviated into a few additional suggestions intended to commend his work for its practical utility to all students, whether novitiates or experienced lawyers, on the Bench or at the Bar, even in our busy modern days.

It has been remarked by a French writer on evolution of law that "of all phases of social life the law is that wherein philosophic speculation has in our day been the least exercised."[2]

If that fact was noticeable on the continent of Europe in the time of that writer, it certainly was more evident on this side of the Atlantic. Although pioneer workers of long foresight in America have made a few valuable contributions to law philosophy, yet of all parts of the civilized world our country has exhibited less of such speculation, until within a recent period, when the activity of some leaders in our universities has developed literary fruits in that field sufficient to induce comment from a distinguished source to the effect that

[1] Formerly Chief Justice of the Supreme Court of Missouri, Circuit Judge in St. Louis, and Judge of the St. Louis Court of Appeals.

[2] *Tarde*, "Les Transformations du Droit," (2d ed., 1894), p. 1.

manifestations here impart "the feeling that the next great step forward in the history of speculative thought may come, not from this old side of the world, but from the United States of America."[3]

Let us hope that expectation may be realized!

The attempts by the Editorial Committee of the Association of American Law Schools to give right direction and impetus to such steps have led to the promotion of the Modern Legal Philosophical Series, including these writings of Del Vecchio, an extremely industrious professor at the renowned University of Bologna, which the philosophical historian Herder[4] described, more than a century ago, as "the learned city" because of its pre-eminence in law teaching. Del Vecchio is worthy of his setting and of its traditions. He brings a message which carries the reader into the pure, invigorating atmosphere of Platonic dialectic, where guiding stars seem brighter and the spell of infinite Mind more potent than elsewhere. When American thought, so intense in its activity, turns freely into channels of such study, we may count upon results which will enlarge the intellectual wealth of our country — our best possession. That study may also play a useful part toward the establishment of an equilibrium between the formulas of law and the ethical justice in public opinion, which latter in an enlightened republic is a force to be reckoned with. The balance-wheel in the American system of government is and long has been the judiciary, which, while exercising as in other countries the ever important function of law interpretation in private controversies, has exerted also a power and finality of interpretation of constitutional and governmental law larger than has been

[3] *Haldane*, "Pathway to Reality," Vol. 1, p. 145.

[4] *Herder*, "Ideen zur Geschichte der Menschheit" (Brockhaus, 1869), Vol. 3, p. 244.

accorded in other parts of the world. The effect of that practice has been to increase the ethical responsibilities of that office in America, as well as to give rise to well defined schools of opinion concerning the scope and limitations of such power.[5]

In some parts of the United States the judiciary has been put upon the defensive as being deficient or at least slow in discerning the force of ethical principles evolved from modern industrial conditions, and as applying the law with obsolete interpretations which disturb the conscience of many of our citizenship. A note of warning has been sounded in a very high quarter:

"If you do not adjust your laws to the facts, so much the worse for the laws."[6]

Now there is no special training for judges marked out by custom or in the program of our law schools other than that intended for students in other walks of our profession. The training and habits of the American lawyer, following the traditions of the Common Law, a system developed from judicial rulings in concrete cases through centuries, prompt him, upon meeting a law problem, to turn to his library to find some decided case as a precedent to guide the court to the result he desires. That practice becomes firmly fixed as part of his mental engineering. If he reaches the Bench he naturally follows his old way as the safe way. The greater importance and weight given, by Bench and Bar alike, to decided precedents in England and America as compared with continental countries, have had a tendency to minimize with us the value of original speculation in all legal investigations.

[5] See Prof. *Pound's* "Scope and Purpose of Sociological Jurisprudence" (1911), 24 Harv. Law. Rev. 591; 25 id, 140, 489. See also "The Danger Line" (1898), 32 Am. Law. Rev. 321.

[6] *Woodrow Wilson*, "The New Freedom" (1913), p. 34.

But the time has come when we must move forward. The complexity of social life, the magnitude of its business affairs and the problems of constitutional law have brought to the surface in recent years momentous questions for the solution of which the rules of ancient law do not appear entirely adequate. They encounter phases of sociology unknown to the revered sages of the Common Law, and although its principles have wonderful capacity for expansion and for application to new conditions, more spiritual light is needed to analyze and solve the enigmas of doubt and difficulty now arising. Some of the difficulties thus perplexing the judges have been shown in an interesting article by Professor Pound, who suggests the propriety of classifying those phases of experience under the head of Sociological Jurisprudence.[7] What better exercise of those higher judicial faculties, imperatively required to solve justly those difficulties, than is found in the study of the science of thinking? Those faculties are stimulated to efficiency by judicious training. It is the best passport to a view of "pure Right as an ideal conception"[8] (to quote our author), by which "many things are made clear, that else lie hidden in darkness."

To follow a master like Del Vecchio through a work such as is here presented is an elevating process worth all the pains needful to garner its complete meaning. Some pains are needful to grasp his scientific method, especially for those who begin with him, for (to quote another) "It is just because the scientific aspect of the truth is the aim of Philosophy that its language is abstract and that its methods have the defect of their quality."[9] But the "quality" is worth the search and the student

[7] 24 Harv. Law Rev. 591; 25 id. 140, 489.

[8] *Del Vecchio*, "Positive Right" (38 Law Mag. & Rev. 1913, p. 308).

[9] *Haldane*, "Pathway to Reality" (1905), Vol. 2, p. xv.

is rewarded for his pains. The judge who meets a problem of conflicting principles in a submitted case, and is required to discern and to decide which principle is paramount and controlling, must search for that truth along lines of reasoning such as we find in these researches of Del Vecchio into the concept of law. Beyond the usual equipment for entering the Bar, no better training can be found for that highest function of our profession, the exercise of legal judgment, than in such study. Its broadening effect is a revelation to many minds. The philosophy of law is so essential a handmaid to judicial investigation in these latter days that a diligent searcher after truth cannot hope to attain a full measure of equipment without it.

Our author, in far off Italy, has emphasized the utility of a clear concept of Right, in the practical administration of justice, along and in immediate connection with his postulate that the certainty of positive law should be such as to guarantee legal liberty to the citizen against the arbitrary will of any judge. That emphasis Del Vecchio has thus expressed:

"Nobody can be ignorant that the interpretation of Right, and especially that which is required of the judge, is a genuine and original consideration of it, that supposes a deep aptitude for it, while it profits by all suggestions evoked by the ever new relations which arise. This judicial interpretation is a subordinate element, but a necessary one for the full development of the system in force: it excites, like leaven, its ideal and hidden powers, and discovers often in ancient laws meanings which their authors could not have explored. But though the logical foundations of the system and the organic unity of its structure remain unchanged by the interpreter, still within these limits the system receives new and fruitful increases in the course of its application."[10]

[10] *Del Vecchio*, "Positive Right," 38 Law Mag. & Rev. (1913), 293.

Those who have passed through the Battles of Ideas which take place on the field of judicial experience between conflicting principles contending in sociological contests [11] will appreciate, more keenly than others can, the wisdom of those observations. As Del Vecchio points out, an understanding of the true concept of law, as he explains it, is of inestimable value in aid of the judicial function. It is no less so to the practitioner at the Bar who must appeal to and convince judges in order to secure the fruits of the knowledge he may possess. The search for that concept of law or Right must become part of that advanced education for which our profession in America, Bench and Bar, are ready, to enable them to move onward to fulfill our manifest destiny of leadership in civilization.

The breadth of discernment which comes from the study of different systems of law and of their correlation and philosophy has been remarked by a distinguished cosmopolitan jurist, now Lord Chancellor, in reference to proceedings of the House of Lords, as a judicatory of Scotch as well as of English law:

"Its history as a Scottish tribunal of appeal has been an illustration on a great scale of the truth that fine legal intelligence, even in a comparatively unfamiliar field, is better than the understanding whose main qualification is only special knowledge. The jurisprudence of all countries is much the same in its fundamental principles. Strip it of its technical terminology, and the differences in great measure disappear. The master of legal principle who has a mind large enough to be free from provincialism is, therefore, in all cases the best kind of judge. What he does not know he sets in its proper place and proportion, as he gathers it from the argument."[12]

[11] *State* v. *Loomis*, 115 Mo. 307 (22 S. W. Rep. 350; 21 L. R. A. 789; *Thayer*, Cases on Const. L., I, 929).

[12] *Haldane*, "Education and Empire" (1902), p. 141.

In our country the varied laws of the several states and the complexity of local governments, in operation by the side of the federal power throughout our Union, present frequent problems of constitutional law calling for the highest degree of philosophical learning in our federal court of last resort. Fitness for service there is incomplete without the broad culture of which Philosophy of Law forms a part. A learned British critic has declared that law reforms in the United States can only be attained "after the reformers have become familiar with the world's methods of juristic thought. They must first be equipped with the state of juristic learning in the world to date. Thus equipped they may then do original work."[13] But another conspicuous English observer, already mentioned, appears to have a more roseate view of our condition and extends warm encouragement to our progress in this field:

"In abstract knowledge as in commerce America is going ahead by leaps and bounds. Why is it? I put it down, partly at least, to the development of higher teaching that has taken place in America."[14]

The teaching of law in our country is keeping up with the intellectual standards of the age, as is evidenced by the introduction of these unique writings of Del Vecchio, along with other books of this Series.

The true lawyer is always a student, young or old. His learning should be varied, broad, accurate and deep, and, in these days, cosmopolitan as well. His power is in his intellectual structure and his character. These he should strengthen by every experience. As was tersely phrased by Dean Wigmore in his model introduction to Gest's "Lawyer in Literature": [15]

[13] Editorial note: 38 Law Mag. & Rev. (1913), p. 499.

[14] *Haldane*, "Education and Empire" (1902), p. 61.

[15] (1913) Boston Book Co., p. xii.

"The best literature — drama or poetry, philosophy or fiction — must always be an arsenal for the lawyer."

We add: that part of the lawyer's fighting armor should be the Philosophy of Law, the study of which ought to "accompany and permeate" the law itself, according to the high authority of Professor Heinrich Ahrens,[16] whose outline for juristic study remains, after more than half a century, a most useful program for the culture of young men in our profession. He recommended Philosophy of Law as part of a three years' curriculum. In many parts of Europe that study has had a similar place in the educational scheme of the best universities as it has now in many of ours. Our author has filled the chair of that science for many years, and is a master in unfolding the wealth of its resources. His is a work of singular merit which now is laid before English-speaking readers. It seems scarcely fair, in an introduction, to filch in advance the sweets of such literary labor, and thereby possibly diminish its zest by diluted paraphrase. These introductory suggestions will endeavor to avoid so doing, although a few specifications of admiration may be tolerated, for reasons which will appear.

The theme of these writings has long engaged the attention of philosophers. Much controversial literature has been produced in discussion as to the true concept of law. There is directness and candor in its present exegesis, refreshing at this advanced stage of the argument. The various schools of philosophic thought, historical, analytic, empirical, positivist, sociological, or by whatsoever names they are self-labeled or otherwise classified, receive alike from Del Vecchio respectful consideration. He probes the intent and spirit of the law

[16] Principles, Juristic Methodology (Hastie, transl., 1892, from Juristische Encyclopädie), p. 224.

deeply, in explaining its meaning. His heart is evidently full of a noble purpose to elevate the ethical results of law administration, the necessity of which elevation he appreciates, as he says (sec. 5):

"The doubt of the innate reason of law is in our day singularly bitter and widespread."

That doubt Del Vecchio evidently believes it is the mission of our profession to dispel. It may do so by developing to the public understanding the inherent justice of law, and its conformity to the standards of ethical Right, the idea of which takes shape in the universal mind before it assumes expression in concrete form as positive law. To vindicate a true concept of the law, as a just, vital, spiritual and uplifting social force, is the proposition read between the lines of this masterwork. The author would infuse into the law the moral tone which it should possess, in all its manifestations.

"The genesis or unfolding of Right out of the spirit of the People is an invisible process." . . .

"The Conviction of the People, as reflected in the Consciousness of its members, is the first of the modes in which Right arises, because it stands nearest to the primary source of all human Right, and is immediately connected with it."[17]

The growth of positive law in the process of evolution from subjective Right is the belief of Del Vecchio, who boldly combats the idea of von Ihering that the power of coercion lies at the root of the concept of law. It was the latter writer who began his greatest work with the dramatic declaration:

"The end of the law is peace. The means to that end is war." . . .[18]

[17] *Puchta*, "Outlines, Science of Jurisp." (Hastie, transl., 1887), pp. 37, 38.

[18] *Ihering*, "Struggle for Law" (Lalor, transl., 5th ed., 1879), p. 1.

In a later work he said:

"The current definition of law is as follows: law is the sum of the *compulsory rules* in force in a State, and in my opinion it has therewith hit the truth. The two elements which it contains are that of rule, and that of the realization of it through coercion. Only those rules laid down by society deserve the name of law which have coercion, or, since, as we have seen, the State alone possesses the monolopy of coercion, which have political coercion behind them. Hereby it is implicitly said that only the rules which are provided by the State with this function are legal rules; or that *the State is the only source of law.*"[19]

That author further developed the theory in the passages which are well answered by Del Vecchio (secs. 139–40). Yet an American statesman and jurist of renown gave some support to von Ihering's idea:

"It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience."[20]

A penalty or force does not appeal to the enlightenment of to-day as the only sanction for a true concept of law. The clash of armies affords little aid to the discernment of truth. Some of the most profound and philosophic students of the world's history have agreed with Del Vecchio that law has a better foundation than coercion for its being. In the 18th century Prof. Rutherforth wrote that "Natural laws are those which mankind are obliged to observe from their nature and constitution," as distinguished from voluntary or positive laws, which mankind "are obliged to observe by the immediate will and appointment of a superior."[21]

[19] *Ihering*, "Law as a Means to an End" (Husik), Boston Book Co., 1913, p. 239, sec. 10.

[20] *Hamilton*, "Federalist," No. 15.

[21] *Rutherforth*, "Institutes" (2 ed.), 1779, p. 8.

Many others have held the same conviction. One of the most erudite writers on this topic in our mother tongue has complained of the narrow interpretation of the term "Law" in the English world:

"It is not necessary to warn a Continental student of the importance of this lesson. None of the words *rech' droit* nor *jus* have ever been restricted to the narrow meaning that, in the hands of Bentham and Austin, the word *law* has acquired in England. And yet it is true that the excessive precision by which the use of the word *law* has of late been narrowed in this country has tended to save English students from many of the pitfalls of vagueness and indeterminateness, not to say sentimentality, to which some foreign writers are undoubtedly prone. But precision, valuable as it is, must not be sought at the expense of truth; and the question is now presented, as to whether recent English legal writers have not, in aspiring after clearness and brevity, entailed upon themselves a loss which is not appreciable at the full till the problem of the scientific nature of so-called 'International Law' comes under treatment."[22]

We need not go further into the polemics of the issue we have last described; although, in fine, we may suggest that much of the apparent difference in opinion among writers of this class, touching the true concept of law, seems to originate in the fact that law, viewed abstractly, contains the elements of many meanings, the precise one of which properly applicable will depend upon the circumstances in the use of that term which unfold its application to the interpreter and its conse-

[22] *Amos*, "Science of Law" (1891), 324.

At the present, in the midst of a general war, it seems inopportune to attempt to follow Dr. Amos concerning the sources and the sanction of International Law. It will be sufficient to cite another notable English philosopher whose carefully defined view agrees with our author that a coercive sanction is not essential to the right concept of law. *Spencer*, "Ethics" (1892), pp. 50–51.

quent import so applied. But that suggestion is not intended to diminish in any respect the usefulness of researches into those meanings.

Our author, outlining the concept of law, is impatient of inertia retarding the activity of its progress. He deplores (sec. 70) a condition of "muteness" to which the Philosophy of Law is to-day reduced before the legislative and political reforms "which are everywhere being realized," when it ought to control them. Here, as in many writings of von Ihering, can be discerned between the lines much of significance, to interpret which the reader should appreciate the environment and the limitations of the authors as oracles of authority, and especially as instructors of youth.

In some parts of our author's cogitations (§§ 69–72) will be found a far reach into the realms of speculation as to the meaning, source and final purpose of the law, suggestive of the thesis so brilliantly unfolded by Viscount Haldane in the "Pathway to Reality,"[23] a work of world-wide philosophical importance. We cannot elaborate in that direction more than to advise the parallel reading of these two writers on the phases of our author's discussion touched by the sections cited.

As to the literary aspect of his work, Del Vecchio is not averse to the "jargon" of the Germans (as Austin calls it).[24] On the contrary, he adheres to their speculative terminology, and is not far away from the school of inspiration of Kant. Yet he has progressed far beyond the neo-Kantian sphere, and gives indications of further development. His work we welcome as a most valuable contribution to that sort of education

[23] (Murray, 1903) Vol. I, pp. 31–32; 52–60. (Murray, 1905) Vol. II, pp. 301–306.

[24] *Austin's* "Lectures," II, p. 737 (Murray, 3 ed., 1869).

which appeals to the noblest and best in our intellectual structure. A recent French writer has said:

"If the social question could be summed up in one formula, we might fearlessly say that the question is one of Education." [25]

One of the most needed phases of education is the science of law philosophy, if our learned profession is to maintain the leadership in thought which it enjoyed in days gone by. The world does not stand still. It is spiritually as physically a movable body. When it stops, it will be at an end. Our author has done his good part toward its uplift and its progress. The seed which he sows is full of vitality and of hope. To close with the words of an energetic leader along the same pathway:

"We must rely chiefly upon the philosophical jurist to keep us in our course toward right and justice as ends." [26]

[25] *Demolins*, "Anglo-Saxon Superiority" (1899), p. 49.

[26] *Pound*, "Scope and Purpose of Sociological Jurisprudence," 24 Harv. L. Rev. 610.

# AUTHOR'S PREFACE

The analysis of the fundamental concepts of jurisprudence is one of the chief duties of the philosophy of law at all times; but it is especially necessary and demands particular attention at present when there exists great doubt as to methods and when a great need of reform in doctrine is everywhere felt.

The prevalence of the empirical tendency and the consequent scarcity of principles give modern conceptual studies a provisional and particular character. Although this makes them better suited to certain concrete and immediate ends, it deprives them of a true "adaequatio rei" and philosophical value. The small success of such studies can also be traced to undue limitations and an undue application of the historical method. The demand for a new basis of jurisprudence is largely unanswered, while philosophical doubt, which is so obvious a mark of it, increases. The multiplication of historical studies, increasing the data, shows more clearly every day the need of giving more weight to speculative and dialectic studies, by which the philosophy of law can exercise its chief duty of systematization and synthesis.

The existing confusion, which has other cognate causes besides the one given, is technically called the crisis of the philosophy of law, a term which well describes the present state of that study, although it needs further explanation on one point. The duty of philosophy is to co-ordinate and regulate the chapters of human

knowledge, whence it follows that every new current which disturbs and alters the content of knowledge is necessarily reflected in philosophy. Every real or ideal historical change constitutes a new element in philosophy, and a new force to be given its place in the conception of the world. What, therefore, is a mark of catastrophe and crisis in the different fields of historical life, is the "raison d'être" of philosophy. It is born of scientific disagreements. It is in necessary and irreconcilable crises that the inexhaustible activity of the mind and its constant effort for unity are shown.

The crisis of the philosophy of law is coeval with the philosophy of law. A glorious crisis marked its beginning, when in the daybreak of the human mind, — Hellenic civilization — the intellectualer volt of Sophic scepticism gave birth to the philosophies of Socrates and Plato. From that day, the history of the philosophy of law has never been separated from that of the serious revolts which have changed the conditions of human society. There is no doubt that this philosophy will be preserved in the future, and far from being weakened or overthrown, will gain new dignity and strength in the struggles in which it will be called upon to intervene. While the occasions, and even the methods and forms of the crises change with the years, yet crises remain the constant law of its development, the surest sign of its life and the chief ground for its necessity.

Critical conceptual revision, however, is not the sole object of legal philosophy. Such a limited program, although in accord with some modern tendencies, is caused by an imperfect conception of philosophy. The definition of the concept of law allows the gathering of empirical data, the objects of history and legal science strictly understood; but since the concept is not complete in these data, its definition serves also as a basis

for a study independent of them, which is especially speculative and looks to the idea of law or pure justice. The concept is the mean term and, as it were, the point of tangency between empirical fact and the ideal.

But a study, above all if it is of a philosophical nature, cannot be well understood until its possibility and method of effectuation are considered. Hence, the need of a preliminary study which well answers these two questions:

Is an objective (and, therefore, universal) definition of law possible?

And, if possible, what are its methodic conditions, that is, how is it possible?

Such is the object of the first part of this volume. Having thus set forth the methodological principles, in the second we proceed, in accordance with these, to the deduction of the concept of law. That gives opportunity for an analytical discussion of the various elements or aspects of this same concept, by which discussion the substantial unity of these several elements is established.

Finally, in the third part, the system of the philosophy of law is completed. For besides the formal concept of law, which embraces every kind of content indifferently, there is set forth the ideal of law, namely: perfect justice, which permits us to estimate properly, as by a touchstone, all the various cases of juridical experience. It is not enough in truth to discriminate (as is done by means of the concept of law) the juridical from the non-juridical. We must besides distinguish within the realm of the juridical that which has more or less of justice. From this comes the necessity of a new search and a new critique, which indeed is derived from the essence of human nature. Thus is satisfied in accordance with an all inclusive conception of the universe that ethical need

of the spirit, which certainly is distinct from the logical but not less legitimate.

Although the three parts of the present volume were originally published separately, they are in reality closely connected with each other, and constitute, as it were, a trilogy. For this reason the idea of the American editors of collecting the three in a single volume has received my full approval. I hope that the reader will consider with indulgence the slight inequality and external lack of harmony, which might arise from the fact that the three parts were composed at different times.

# LIST OF ABBREVIATIONS USED

| | |
|---|---|
| **Ahrens.** | Naturrecht — Naturrecht oder Philosophie des Rechts und des Staats. |
| **Anzilotti.** | La Scuola del diritto naturale — La Scuola del diritto naturale nella Filosofia giuridica contemporanea. |
| **Aristotle.** | Anal. Post. — Analytica Posteriora. |
| | Met. — Metaphysics. |
| | Nic. Ethics — Nicomachean Ethics.. |
| | Phys. — Physics. |
| | Polit. — Politics. |
| **Brugi.** | Introduzione — Introduzione enciclopedica alle scienze giuridiche e sociali nel sistema della giurisprudenza. |
| **Burle.** | Essai historique — Essai historique sur le developpement de la notion de droit naturel dans l'antiquité grecque. |
| **Cantoni.** | Vico — G. B. Vico. Studi critici e comparativi. |
| **Carle.** | La Filosofia del diritto — La Filosofia del diritto nello stato moderno. |
| | La vita del diritto — La vita del diritto nei suoi rapporti colla vita sociale. |
| **Carlyle.** | A History — A History of Medieval Political Theory in the West. |
| **Cavagnari.** | Saggio di Filosofia giuridica — Saggio di Filosofia giuridica secondo i canoni della scuola storica. |
| **Croce.** | Filosofia di Hegel — Ciò che è vivo e ciò che è morto della Filosofia di Hegel. |
| **Filomusi-Guelfi.** | La dottrina dello Stato — La dottrina dello Stato nell' antichità greca nei suoi rapporti con l'Etica. |
| | Del concetto del diritto — Del concetto del diritto naturale e del diritto positivo nella storia della Filosofia del diritto. |

| | |
|---|---|
| Fiorentino. | Telesio — Bernardino Telesio ossia studi storici su l' idea della natura nel risorgimento italiano. |
| Flint. | Vico — G. B. Vico. |
| Gabba. | Alcuni più generali problemi — Intorno ad alcuni più generali problemi della scienza sociale. |
| Hildenbrand. | Geschichte und System — Geschichte und System der Rechts- und Staatsphilosophie. |
| Janet. | Histoire de la science politique — Histoire de la science politique dans ses rapports avec la morale. |
| Jellinek. | System — System der subjektiven öffentlichen Rechte. |
| Jodl. | Ueber das Wesen des Naturrechts — Ueber das Wesen des Naturrechts und seine Bedeutung in der Gegenwart. |
| Kant. | Krit. d. rein. Vern. — Kritik der reinen Vernunft. |
| | Krit. d. prakt. Vern. — Kritik der praktischen Vernunft. |
| | Krit. d. Urtheilskr. — Kritik der Urtheilskraft. |
| | Vom Verhältniss. — Vom Verhältniss der Theorie zur Praxis im Völkerrecht. |
| | Met. Anfangsgr. d. Rechtslehre—Metaphysische Anfangsgründe der Rechtslehre. |
| Lange. | Geschichte des Materialismus — Geschichte des Materialismus und Kritik seiner Bedeutung in der Gegenwart. |
| Merkel. | Gesammelte Abhandlungen — Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts. |
| Petrone. | Contributo — Contributo all' analisi dei caratteri differenziali del diritto. |
| Plato. | Repub. — Republic. |
| Post. | Bausteine — Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis. |
| Puchta. | Cursus — Cursus der Institutionen. |
| Savigny. | Vom Beruf unserer Zeit — Vom Beruf unserer Zeit für Gesetzegebung und Rechtswissenschaft. |
| | Syst. — System des heutigen römischen Rechts. |
| Spinoza. | Tract. Pol. — Tractatus Politicus. |
| | Tract. Theol. Polit. — Tractatus Theologico-Politicus. |

| | |
|---|---|
| **Stammler.** | Wirtschaft und Recht — Wirtschaft und Recht nach der materialistischen Geschichtsauffassung. |
| **Thomasius.** | Fund. Jur. Nat. et Gent. — Fundamenta Juris Naturæ et Gentium. |
| **Thomas Aquinas.** | Sum. Theol. — Summa Theologica. |
| **Trendelenburg.** | Naturrecht — Naturrecht auf dem Grunde der Ethik. |
| **Vico.** | Scienza nuova — Principj di scienza nuova d'intorno alla comune natura delle nazioni. |
| **Vanni.** | Filosofia del diritto — Il problema della Filosofia del diritto nella filosofia, nella scienza e nella vita ai tempi nostri. |
| | Maine — Gli studi di H. S. Maine e le dottrine della Filosofia del diritto. |
| | Sist. di Spencer — Il sistema etico-giuridico di H. Spencer. |
| | Lezioni — Lezioni di Filosofia del diritto. |
| **Zeller.** | Die Philosophie der Griechen — Die Philosophie der Griechen in ihrer geschichtlichen Entwicklung. |
| | Ueber teleologische und mechanische Naturerklärung — Ueber teleologische und mechanische Naturerklärung in ihrer Anwendung auf das Weltganze. |
| **Windscheid.** | Pand. — Die Lehre der Pandekten. |

# The Formal Bases of Law

# THE FORMAL BASES OF LAW

## PART I

## THE PHILOSOPHICAL BASES OF THE IDEA OF LAW

### CHAPTER I

### REASON AND NECESSITY FOR A LOGICAL DEFINITION OF LAW

IMMEDIATE INTUITION OF LAW AND ITS INSUFFICIENCY. — THE SYSTEMATIZING FUNCTION OF DEFINITION. — ACTUAL NEED FOR A LOGICAL TREATMENT OF LAW.

§ 1. *Definition of Law.* The application of a juridical criterion to man's acts, or their consideration "sub specie juris" is so old, universal, and frequent, that law should be clearly and distinctly understood by everyone. Every educated man, it would seem, should be able to answer the question, "What is law?" with facile certainty, and his thoughts and acts should be controlled by its concept. But this is far from true; many of those who have given special study to legal principles and institutions would hesitate to offer an answer. Whoever considers the diversity and incongruity of its definitions cannot fail to see that, notwithstanding the labor expended on the science and philosophy of law

and the number of special researches recently instituted, the concept of law has not yet assumed definite shape in a truly logical sense.[1]

§ 2. *Intuition of Law.* The reason why the need of a definition is not more apparent is because law is generally felt as an immediate and simple intuition.[2] The idea of law is one of those ideas which seem intelligible

[1] *Gierke* wrote, "At the beginning and the end of the study of jurisprudence there stands, as a matter of course, the question, 'What is law?' Law is neither better nor worse than its many cognate studies. Many hundred years of effort have had no result in obtaining a universally true answer to this question. No universal practical definition has been found showing the relation of law to other fields of man's social activity." "Naturrecht und deutsches Recht" (Frankfurt, 1883), p. 4. *Bergbohm* wrote to the same effect, "Words unfortunately cannot give even an approximate picture of law. On the contrary, the legal concept is more unstable to-day than ever; uncertainty envelops it on every side. Upon reading on this subject, one finds much groping in the dark and many provisional definitions without any underlying scheme or connective links, where all should be worked in together." "Jurisprudenz und Rechtsphilosophie," I Bd. (Leipsic, 1892), p. 77.

[2] This quality as a psychological fact is recognized even by those who deny the "apriority" of the idea of law. See, particularly, *J. Stuart Mill*, "Utilitarianism" (London, 1863), Ch. V; *Stricker*, "Physiologie des Rechts" (Vienna, 1884), p. vii; *Letourneau*, "L'évolution juridique dans les diverses races humaines" (Paris, 1891), Preface. And the attacks on the "naturrechtliche Psychologie" — even those as bitter as *Bergbohm's* ("Jurisprudenz und Rechtsphilosophie," p. 454 et seq.) — cannot weaken the evidence of juridical feeling. Cf. *Pütter*, "Der Inbegriff der Rechtswissenschaft oder juristiche Encyclopädie und Methodologie" (Berlin, 1846), Introduction; *Hoppe*, "Der psychologische Ursprung des Rechts" (Würzburg, 1885), (the refutation of the work we have cited by Stricker); *Miceli*, "Filosofia del diritto internazionale" (Florence, 1889), p. 150 et seq; "Studi di psicologia del diritto," I. "Le basi psicologiche del diritto" (Perugia, 1902). Also *Del Vecchio*, "Il sentimento giuridico" (Turin, 1902, in "Rivista italiana per le scienze giuridiche," Vol. XXXIII; and 2 ed., 1908) and other authors there cited.

of themselves — almost obviating the difficulty, which so troubled Jean Jacques Rousseau, that definitions need words.[3] Certain it is that the generic intuition of law and its many resultant forms have, in most instances, taken the place of logical definitions. So the idea of law has been "pure ac simpliciter" taken for granted in legal doctrines and studies, and in practice definitions have been used which were so imperfect and defective that, considered apart, they seem fitted rather to increase than destroy the doubts about the specific nature of law. Emmanuel Kant wrote:[4] "Jurists still seek a definition of their concept of law," and it cannot be said that time has yet reversed his judgment.[5] Our progress without

[3] "The method of defining all terms and of constantly substituting the definition for the defined seems good, but is impractical; for how can a circle be avoided? Definitions would be excellent, if we did not need words to make them." *Rousseau*, "Émile," Lib. II, (Lefevre ed.), p. 101. Cf. *Pascal*, "Pensées," P. I, Art. I and II (Didot ed.), p. 25 et seq.

[4] "It is advisable but often difficult to obtain (a definition). The jurists still seek a definition of their concept of law." "Kritik der reinen Vernunft," Transscendentale Methodenlehre (Hartenstein ed.) (Leipsic, 1853), 1 Hauptst., 1 Abschn., p. 525 n. We may note that this passage from Kant is often referred to; *Trendelenburg*, "Die Definition des Rechts" in "Kleine Schriften," Zw. Th. (Leipsic, 1871), p. 81; *Rümelin*, "Eine Definition des Rechts" in "Reden und Aufsätze," Neue Folge (Freiburg, 1881), p. 317; and *Stammler*, "Wirtschaft und Recht nach der materialistischen Geschichtsauffassung" (Leipsic, 1896), p. 492.

[5] In this regard, we may recall a profound doctrine of Kant, which holds that it is possible to develop what is called a science only by a system derived from a pure idea. And yet (he observes) it is rare that the system and the definition itself on which it is based correspond to the idea. It exists as a germ in the mind, in which all the elements are hidden, enveloped, and often hardly recognizable by a microscopic observation. Only after we have spent much time (led by the idea latent in us) getting together many separate pieces of knowledge relative to it as material for construction, and an equally long time

a definition may raise doubts as to its necessity. For, if the science of law can be formed and developed in every branch with merely an intuitive and generic knowledge of its object, if the nature of law is well known, if everyone daily finds its meaning clearly shown in his own and other's acts, what advantage can there be in a rigorous examination of its concept? A definition might rather lessen than increase its clearness. Thus Reid argued in regard to contracts, showing that the definitions of Ulpian and others, far from clearing, obscured the idea commonly held, and he concluded that definitions of what is clear of itself are worse than useless.[6] Certainly, if the purpose of definition is to render an object clearer they fail more often than not. In the greater number of cases, an example or characteristic is more fitted to illustrate an idea than a strict analysis of its logical content.[7] On the other hand, an intuitive idea of an object is not usually the result of definition but the basis of it — its natural and constant boundary; whence, a circle from which we vainly try to escape. Why, therefore, is definition necessary, and what is its function in the search for knowledge? And how can we explain the fact, noted by John Stuart Mill, that "some of the most profound and most valuable investigations

arranging them technically, is it possible for us to show the idea clearly and to build up a whole according to the uses of reason. "Krit. d. rein. Vern.," Transscendent. Methodenl., III Hauptst.: "Die Architektonik d. r. Vern.," p. 591 et seq.

[6] Vide *Reid*, "Essays on the Intellectual Powers of Man," Essay V, Cap. VI: "On the Nature of Contract and of Obligation from Which It Is Derived." Also *Pascal*, "Pensées," Art. I and II, p. 25 et seq.

[7] *Kant's* advice is good: as a rule of prudence, do not give a definition when the citation of some character of the object is sufficient. "Krit. d. rein. Vern.," p. 227, n. 2.

which philosophy presents to us have been introduced by, and have offered themselves under the guise of, inquiries into the definition of a name"?[8]

§ 3. *The Systematizing Function of Definition.* This belief is very different from that which Reid and many with him seem to uphold. The duty of definition — more than to make an object clear — is to give it its true place in the scheme of knowledge, to show its origin and connections with other cognate facts which depend upon its essential qualities, so that those problems which cannot be well answered by the simple aid of popular knowledge may be solved. We must not be surprised, therefore, to find that the definition is often more difficult and complicated than the popular idea. It is a mistake to think this a mark of imperfection or inutility. To go back to the example which we have given: the exact determination of the concept of contract guides us in building up a theory and shows essential elements and possible vices; for which purpose, simple popular thought, however clear, would not be sufficient. The function of every conceptual study is, therefore, *systematic.* The analysis of concepts should be a way and means to the work of co-ordination and synthesis, which is the final goal of science and of philosophy.[9]

§ 4. *The Insufficiency of Immediate Intuition.* The history of juridical thought shows clearly that immediate intuition cannot take the place of rigorous analysis. Even if everyone knows well enough what is meant by law under most concrete circumstances, and if ordinary juridical manifestations are universally recog-

[8] *J. Stuart Mill.* "A System of Logic, Ratiocinative and Inductive," 4th ed., Vol. I, p. 175.

[9] Cf., on the subject of the function of definition, *Taine*, "Le positivisme anglais," "Étude sur Stuart Mill" (Paris, 1878), p. 125 et seq.

nized as such, infinite difficulties would arise[10] in relation to the highest and most general problems, from the need of fitting the idea of law into our scheme of knowledge, showing its essential elements and distinguishing it from other closely related objects and categories. These difficulties, spreading from the scientific sphere to that of common knowledge, increase the tendency to scepticism, the love of paradox and the sophistic opinion of the non-existence of the philosophy of law, contra-distinguished from positive jurisprudence, except as a kind of science of phantasy in the minds of arbitrary thinkers.[11]

§ 5. *Actual Need of a Logical Treatment of Law.* The doubt of the innate reason of law is in our day singularly bitter and widespread. While, on the one hand, the schools are confused by the greatest uncertainty of method and variety of tendencies, on the other hand (by reason of the same facts), the most absolute theories are held by the laity, which alternately asserts and denies law in the abstract, attributing values and sources to it at will, extending or restricting its applicability, admitting new and excluding old qualities without a full knowledge of the meaning of their presuppositions and results.[12] It is obvious that only a rigorously objective criticism can throw light on so many ambi-

[10] Vide similar observations by *Herbart*, "Analytische Beleuchtung des Naturrechts und der Moral" (Göttingen, 1836), Introduction, § 1.—*Gierke*, "Naturrecht und deutsches Recht," p. 4, enumerates the principal questions that arise from the various doctrines of the concept of law. See also, as to the harm done by uncertainty about fundamental juridical concepts, *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," pp. 90–102.

[11] *Hobbes* noted the beginning of this tendency: "Scientiam hanc civilem . . . non modo philosophi, sed etiam otiosi, quasi facilem nullo studio ambiendam, cujuslibet ingenio naturali expositum et prostitutum attrectaverunt attrectantque." ("De Cive," Præf.)

[12] *Spencer* lamented this abuse. "Justice," § 37.

guities, by laying bare the initial points of divergence in method and doctrine, and rendering possible at least (through an analysis of the conceptual presuppositions) a clear discussion of points now hidden by misunderstanding.

# CHAPTER II

## DIVERGENCY IN POSITIVE LAW AND THE SCEPTICAL CONCLUSIONS BASED THEREON

PROBLEMS OF DEFINITION AND CONTRADICTIONS IN HISTORICAL DATA. — SCEPTIC THEORY. — NEED OF A HIGHER SYNTHESIS.

§ 6. *Variety of Historical Data.* If we seek the aid of history to show what law is, we find a manifold variety of juridical determinations and institutions adopted in turn by different nations. It does not give a positive answer. Every historical system determines in its own way what law is and what law is not; the same act or relation may be differently qualified in different ages or by different peoples. This is the first evidence which a most superficial examination of history gives.[1] The variance of the juridical criterion with time and place has been an object of study from a very early period. Tales of historians and travelers, communications with foreigners in war or trade, apart from everyone's personal experience, especially in times of revolution, have

[1] "Comparative law teaches that law differs in different ages and with different peoples and that often law has decreed what we, with our modern comparative law and reason, hold to be illegal and even absolutely wrong. In the historical development of law it is not unusual to find something permitted by one legal system, to which another system metes out the direst punishment." *Post*, "Der Ursprung des Rechts." "Prolegomena zu einer allgemeinen vergleichenden Rechtswissenschaft" (Oldenburg, 1876), p. 17. Also the examples there given.

been sufficient to call attention to this fact[2] and require its investigation. Ordinarily, as Herodotus said in his "History,"[3] each people has its own laws, which it believes best suited for its betterment, and remains firm in this belief until with the development of speculative thought it finds marks of relativity in the ethnical and temporal limits of its statutes; this is a "punctum pruriens" of philosophy and opens the door to scepticism. The primal santity of law is subjected to destructive analysis; existing systems are shown to be the effects of free will or based on transitory and particular conditions; the positivity or extrinsic force of law appears distinct and separate from its nature or intrinsic reason.

§ 7. *The Sophistic and Sceptic Theory. Pyrrho.* This attitude of thought is clearly and characteristically shown by the Sophists.[4] Sceptic philosophy, under the leadership of Pyrrho, developed afterwards the antinomy of the real to an extreme, employing the diversity of judgments on the same object to show the impossibility of knowledge. Of the ten tropes (τρόποι, called also, λόγοι or τόποι),

[2] For the ancient sources of observation on this point, see *Gomperz*, "Griechische Denker" (French ed.), "Les Penseurs de la Grèce," I (Paris, 1904) p. 11 et seq., 403 et seq.

[3] Lib. III, Cap. 38.

[4] Vide *Chiappelli*, "Sulle teorie sociali dei sofisti greci" (in "Atti della R. Accademia di scienze morali e politiche," Vol. XXIII (Naples, 1889). Cf. *Petrone*, "Le nuove forme dello scetticismo morale e del materialismo giuridico" (in "Rivista Internazionale di scienze sociale e discipline ausiliarie," Sept. and Oct., 1896), including a just comparison of the Sophists with some modern ethico-juridical doctrine. As to the ethical and theoretical doctrines of the Sophists, see also the fundamental treatise by *Zeller*, "Die Philosophie der Griechen in ihrer geschichtlichen Entwicklung," Erst. Th., Zw. Hälfte, 5 ed. (Leipsic, 1892), p. 1033 et seq.; the critical observations by *Simmel*, "Einleitung in die Moralwissenschaft," 2 Ausg. (Stuttgart, 1904,) II Bd., p. 100 et seq.; and *Fragapane*, "Il problema delle origini del diritto" (Rome, 1896), Lib. I, Cap. I.

by means of which the Sceptics showed the suspension of all judgment, (ἐποχή, ἀφασία), one is based on the discordancy of institutions, customs, beliefs and laws, from which it is inferred that no one can affirm what is truly just or unjust "per se," but only in relation to some institution, law, or custom.[5]

§ 8. *The Sceptic Theory. The Second and Third Academies.* The scepticism of the Second and Third Academies, while less radical than that of Pyrrhonism, is based on the same principles. The furore in Rome over the dialectic of Carneades is well known. In approaching Pyrrhonism, he held that the criterion of the just does not lie in nature, "nam si esset ut calida et frigida et amara et dulcia sic essent justa et injusta eadem omnibus." "Genera vero si velim juris institutorum morum consuetudinumque describere non modo in tot gentibus varia sed in una urbe vel in hac ipsa millies mutata demonstrem." [6]

[5] The ten tropes are attributed to Enesidemus by *Zeller*, "Die Philosophie der Griechen," Dritt. Th., Erst. Abth., p. 485 et seq. See *Sextus Empiricus*, "Pyrrhoniæ Hypotyposes," Lib. I, 14; III, 23. Apart from the real discordances, the Sceptics, in order to prove the indefinite variability of customs, took even possible discordance into their calculations. "If we did not have arguments at hand to prove differences, we would only have to suggest that they might exist among peoples unknown to us. For example, though the Egyptian custom of marriage between brothers and sisters were unknown, we could not state absolutely that such a custom did not exist, so that even if the facts which we know are in conformity, we cannot state that they conform to all facts in their order." *Sextus Empiricus*, "Pyrrhoniæ Hypotyposes." Cf. *Diogenes Laertes*, in his life of Pyrrho, § IX.

[6] To this effect, *Cicero*, restating the ideas of Carneades, "De Republica," III, 5 et. seq. Cf. *Hildenbrand*, "Geschichte und System der Rechts- und Staatsphilosophie," 1 Bd. (Leipsic, 1860), § 121; *Zeller*, "Die Philosophie der Griechen," Dritt. Th., Erst. Abth., p. 497, et seq.

§ 9. *The Sceptic Theory. Montaigne.* This same process of thought we see repeated by the French sceptics. Michel de Montaigne, "the first Frenchman who dared think," asked: "What goodness can there be which the passage of a river makes a crime? What truth is there bounded by these mountains, a lie to the men across them? The true commands of nature we obey, without a question of common consent." "There is nothing," he adds, "in which the world differs so much as in customs and laws. What is abominable here meets approval elsewhere. Infanticide, patricide, communion of women, traffic in stolen goods, license for all kinds of voluptuousness—nothing in fact is so extreme that it is not admitted by the usage of some nation." [7]

§ 10. *The Sceptic Theory. Pascal.* Later, Pascal was of the same opinion: "We can hardly find a belief of justice or injustice, which does not change its quality with a change of clime. Three degrees of latitude reverse all jurisprudence. A meridian decides what is true, or a few years' possession. . . . Law has its ages. Conventional justice, which a river or mountain bounds! Truth on this side of the Pyrenees, error on that." [8]

[7] *Montaigne*, "Essais," Lib. I., Cap. 22; Lib. II, Cap. 12.

[8] *Pascal*, "Pensées," Pt. 1, Art. VI, 8; vide also VI, 9, IX, 5 et seq. According to Pascal, original sin deprived man of all knowledge of true justice and the contradiction of laws is a consequence thereof. Cf. *Dubuc*, "Quid de juris principio et essentia Pascalis senserit" (Paris, 1888). This was also the thought of Montaigne, who did not absolutely deny the existence of natural law, but only the possibility of its knowledge by reason (vide "Essais," Lib. I, Cap. 22; Lib. II, Cap. 12). It was generally admitted in the Middle Ages that the destruction, or man's loss of vision, of justice was one of the effects of his fall. See the famous "Speculum juris" of *Duranti* (Sec. XIII), Proemium, cited by *Filomusi-Guelfi*, "Del concetto dell' enciclopedia del diritto" (Naples, 1876), p. 4. The exaggeration of this concept gave scepticism a kind of theological basis.

§ 11. *Variance of Law. Locke.* Beyond the confines of scepticism, the variety of human judgments is used to prove the non-existence of absolute law and its corresponding intuition in the human mind. Locke, for example, to prove that there are not innate ideas of the practical as well as of the speculative order, relies on the fact that there is no rule of justice of universal acceptance.[9] To-day the followers of practical ethics generally accept such reasoning.[10]

§ 12. *Method of a Higher Synthesis.* As to pure scepticism, it is evident that it raises the problem but does not solve it. In fact, it declares it unsolvable and absolutely repudiates science. But scientific knowledge is a necessary aspiration of our spirit,[11] whose consciousness of self shows an undeniable and constant proof of vital and intellectual existence. Hence it is that, although sceptical negation reappears periodically on the speculative horizon (fulfilling a special function), it only represents a transitory phase of thought. Sceptical negation or doubt is followed necessarily by new and profound positive constructive labor, which the prior doubt has prepared and incited. A stronger and more fecund expansion follows the restriction.[12] So in relation to law, the sceptical point of view cannot satisfy the human mind, which always struggles to

[9] Vide *Locke*, "Essay Concerning Human Understanding," I, 2.

[10] See, for example, besides *Post*, "Der Ursprung des Rechts," cited ante: *Bain*, "Mental and Moral Science" (London, 1884), p. 449 et seq; *Spencer*, "The Data of Ethics," § 14; "The Inductions of Ethics," § 120. We will consider this again in Caps. VI and VII, p. 32, post.

[11] "Πάντες ἄνθρωποι τοῦ εἰδέναι ὀρέγονται φύσει." *Aristotle*, "Metaphysics," Lib. I, Cap. I. Cf. note by *Barthélemy Saint-Hilaire*, "Metaphysique d'Aristote," Vol. I (Paris, 1879), pp. 1-2.

[12] This psychological fact, which we find in individual thought as well as in the dominating thought of various historical epochs, is of itself one of the strongest arguments against scepticism.

overcome the contradictions of the empirical world and to reach a simple rational principle — in other words, to reduce the manifold variety of historical laws to one general and constant system. Attempts at synthesis, which "ab antiquo" have occupied a notable part of scientific and philosphic thought, have been made in divers ways and according to different criteria. Hence we must consider them separately, with an eye to the purpose we wish to accomplish.

# CHAPTER III

## IDEA OF NATURAL LAW

NATURAL LAW AS SHOWN BY CONSCIENCE AND AS A PHILOSOPHICAL PROBLEM. — MODERN REFUTATION AND ITS VALUE. — DISTINCTION OF THE QUESTION OF NATURAL LAW FROM THAT OF THE LOGICAL DEFINITION OF LAW.

§ 13. *Absolute Justice.* It is worthy of consideration that, even in ancient times, arguments in favor of the conception of a criterion of the just, which would be fixed and "per se" valid, rising superior to conflicts of opinion and variance of fact, have been raised by the historical mutability and incoherence of law, which are the origin of moral and political scepticism. And the possible conflicts alleged by the sceptics, in addition to the real discordance between institutions, the indefinite possibilities of contradictory institutions in the historical field, seem, in the light of moral consciousness, the most certain proof of the necessity of finding the foundation of justice elsewhere (than in empirical facts), in order to render it independent of the fact of its positive sanction.[1] The conception of

[1] *Cicero* is characteristic of these thinkers, "De Legibus," I, 15 et seq.: "Jam vero illud stultissimum, existimare omnia justa esse, quæ sita sint in populorum institutis aut legibus. Etiamne, si quæ leges sint tyrannorum? Quodsi populorum jussis, si principum decretis, si sententiis judicum jura constituerentur, jus esset latrocinari, jus adulterare, jus testamenta falsa supponere si hæc suffragiis aut scitis multitudinis probarentur." For the antithesis of this, see *Sextus Empiricus*, "Pyrrhoniæ Hypotyposes," cited ante, n. 5, p. 1.

We may say that this is not the only case of antinomy of human

absolute justice is one of the fundamental needs of the human mind. If customs and commands by dominant powers were recognized only indistinctly in their extrinsic authority, and if juridical norms had no other weight than that given by the fact of their respective authorization, they would lack their actual respondence with and foundation in the human soul, and the ideal subjective vocation for justice, which is the primary condition and basis of positive law, would be a fiction.

§ 14. *Natural Law.* It is not without deep-seated reason that in all ages and countries the idea of natural law, that is, one founded on the very reality of things and not on the simple "placet" of the legislature, has been cultivated. This conclusion is reached in various and opposite ways; by observing certain rules of law which exist in widely separated countries, as well as by seeing the need of overcoming the caprice and irrationality of rulers and judges, through recourse to a system of unwritten truth. This law has shown its authority in various ways. It has been upheld as the will of God; it has been deduced analytically from pure reason, and considered as a reflex or result of physical laws. The relations between the dictates of natural justice and juridical norms have also been variously conceived, depending upon diverse speculative tendencies and historical phases. Often a wide and impassable separation arose between the two systems of determination, while at other times the difference seemed one of genus and species, or two views of the

thought, where diverse views of the same fact have brought about opposite ethical inductions. Thus the existence of evil in the world gives rise to arguments both for and against the existence of God. See, on this point, *Faggi*, "Un' antinomia dello spirito umano," in "Rivista di Filosofia," Vol. I, 1899, p. 105 et seq.

same object.[2] These partial divergencies in doctrine (common to all branches of philosophy) should not prevent the recognition of the deep-seated unity of the conception, containing all the characteristics of a psychological necessity, which is not disproved, but confirmed, by the number of ways in which the concept itself is reached and by the number of demonstrations given of it. We must not forget that the divergency lies much more in methods and arguments than in conclusions. For example, certain conclusions of natural law are reached from widely differing premises. The well-known coincidences in the juridical formulæ of Kant and Spencer are examples of this.[3] That many

[2] *Hegel*, for example, considered the difference between natural and positive law to be analogous to that between the Institutes and the Pandects; "that natural law or the philosophy of law is different from positive law, the latter being confused in the former; that they are contrary and opposed to one another, is a grave misconception; the former bears the same relation to the latter as the Institutes bear to the Pandects." "Grundlinien der Philosophie des Rechts" 2 ed. (Berlin, 1840), § 3. On this concept, and in general on opinions on this subject, cf. *Filomusi-Guelfi*, "Del concetto del diritto naturale" (Naples, 1874).

[For a criticism of *Hegel's* analogy see *Miraglia*, "Filosofia del diritto," 3d ed. (Naples, 1903), p. 156, trans. under title of "Comparative Legal Philosophy" (Boston, 1912), § 155.—*Tr.*]

[3] According to *Spencer*, the fundamental principle of law is "the liberty of each, limited only by the like liberties of all"; whence his formulas: "Every man is free to do that which he wills, provided that he infringes not the equal freedom of any other man." "Justice," § 27. He expressed the same idea in 1850 in "Social Statics." As he himself recognized later (see "Justice," Appendix A) this formula is analagous to Kant's, "So act that the free use of your free will can co-exist with the liberty of all under a universal law." "Metaphysische Anfangsgründe der Rechtslehre," 2 ed. (Königsberg, 1798), Introduction, § C. And yet, no two things could differ more than the methods by which the two philosophers reach the same conclusion. See "Justice," App. A; cf. *Carle*, "La Filosofia del

points in the subject-matter are sources of controversy only proves that the philosophy of law has not completed its mission. Perhaps it never will. But, this doubt is not enough to destroy or counter-balance the constant attestation of consciousness, which is the apologia of the philosopher of law, and which is far more certain than most of its deductions and disquisitions. What is a source of difficulty for science does not cease to exist in reality; and it is a vain illusion to ignore a need because we cannot satisfy it.

§ 15. *Modern Refutation of Natural Law and its Value.* The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past; but it is unjust and irrational, if it attempts, under the pretext of correcting such errors and omissions, to destroy the object of these systems, which is essential to human nature. That law is only positive is a simple affirmation which has not been and cannot be proved, but is believed out of respect to a dogma of a passing philosophy.[4] All the arguments used to demolish natural law are based on this hypothesis, and are reducible, therefore, to the proof that natural law does not exist . . . as positive law, which is not the question. It would be entirely

diritto nello Stato moderno," Vol. I, Sec. 1 (Turin, 1903), p. 240 et seq. See also *Anzilotti*, "La scuola del diritto naturale nella Filosofia giuridica contemporanea" (Florence, 1892), p. 13 et seq. It must be stated, however, that the deep diversity of Kant and Spencer's concepts of freedom gives their formulas meanings not perfectly homogeneous.

[4] A proof of this thesis cannot be found in *Wallaschek*, "Studien zur Rechtsphilosophie" (Leipsic, 1889); *Bergbohm*, "Jurisprudenz und Rechtsphilosophie; *Jodl*, "Ueber das Wesen des Naturrechtes und seine Bedeutung in der Gegenwart" in "Juristische Vierteljahresschrift," Bd. XXV (Vienna, 1893), 1 Heft, nor in the works of all those who have attempted the destruction of natural law.

superfluous to repeat here the reasons, already well enunciated by Petrone and others, which show that the existence of natural law is purely deontological and normative, that is, equivalent to a *duty to be* and not to an *existence in fact.* It exists inasmuch as it is a force, and it has force even where it is broken. The violation is phenomenal and does not destroy law, which is above phenomena. Natural law exists, therefore, as a system of the highest truths, not sensible but rational,[5] and is, then, independent of the existence of common institutions in all nations, and apparent disagreements with reality. So while psychological analysis reveals the foundation of an absolute law of justice (or natural law) in the human spirit, critical gnoseology endorses its validity, explaining its special method of existence and showing its full applicability in its proper sphere. The idea of natural law, which has withstood the attacks of sceptics and empiricists in past times, will resist those of modern positivists,[6] and will guide humanity in the future.[7]

[5] This distinction was not unknown to the great masters in natural law, even before Kant and the "Vernunftrecht." *Thomasius*, for example, says explicitly as in a passage to which we have referred before (cf. *Del Vecchio*, "Diritto e personalità umana nella storia del pensiero," Bologna, 1904): "Jus pro lege acceptum est vel naturale vel positivum. Fundamentum huius divisionis est principium cognoscendi. Jus naturæ cognoscitur ex ratiocinatione animi tranquilli, jus positivum requirit revelationem et publicationem." "Fundamentum Juris Naturæ et Gentium," Lib. I, Cap. V, § XXIX.

[6] Special attention must be called to the fact, which we have alluded to above (n. 3, p. 16.) that Spencer, the leader of modern positivism, has accepted the concept of natural law and acted as sponsor for it in his book "Justice." All this to the great scandal of his followers, who accused him of inconsistency. Cf. *Vanni*, "Il problema della Filosofia del diritto" (Verona, 1890), p. 60 et seq; "Il sistema etico-giuridico di Herbert Spencer" (an introduction to the

§ 16. *The Question of Natural Law Does not Involve the Logical Definition of Law.* The need of a logical determination of law, which is the object of our study, must be kept distinctly separate from the deduction of a system of natural or rational law. This consideration prompts us to make a more minute analysis of natural law. When this deduction was made, we had not solved

Italian edition of "Justice"), esp. pp. ix–xxix et seq.; *Anzilotti*, "La scuola del diritto naturale," p. 16. We cannot deny the inconsistency, but must be content with determining which of his contradictory doctrines contains the truth.

[7] This prophecy is *Carle's*, an eloquent defender of the theory of natural law. Vide "La Filosofia del diritto," Pt. 1, Lib. III, Cap. IV; and cf. *Bryce*, "The Law of Nature," in his "Studies in History and Jurisprudence" (Oxford, 1901), Vol. II, pp. 112–172. For a historical appreciation of the idea of natural law, read *Filomusi-Guelfi*, "Del concetto del diritto nat.," "Enciclopedia giuridica," 5 ed. (Naples, 1907), §§ 15 and 37. *Petrone* has published an excellent critical vindication of natural law in "La fase recentissima del Filosofia del diritto in Germania" (Pisa, 1895), § 2, Cap. III; in "Filosofia del diritto al lume dell' idealismo critico" in "Rassegna nazionale" (Florence, 1896); and in "La storia interna e il problema presente della Filosofia del diritto" (Modena, 1898). Against the theory that law must be positive, see *Del Vecchio*, "Sulla positivita come carattere del diritto" (English Trans., "Positive Right," in Law Magazine and Review, vol. 38, May, 1913); *Miceli*, "Filosofia del diritto internazionale," p. 232 et seq, 282 et seq.; "Studi di psicologia del diritto," I, p. 150 et seq.; "La giustizia e il diritto nei loro caratteri differenziali" in "Riv. Ital. di Soc.," Anno IV, 1902, Fasc. II–III. See also *Miraglia*, "La Filosofia del diritto," Lib. II, Cap. I and II, or its English translation, "Comparative Legal Philosophy," loc. cit.; *Wautrain-Cavagnari*, "Genesi, fondamento, e fine del diritto in relazione con l'ordine universale" (Genoa, 1876); "L'ideale del diritto" (Genoa, 1883), Cap. I, VIII; *Cavagnari*, "Corso moderno di Filosofia del diritto" (Padua, 1882–92), Vol. I, p. 154 et seq.; *Lilla*, "Il diritto nei suoi rapporti colla persona, colla società, e collo Stato," in "Studi giuridici dedicati a F. Schupfer" (Turin, 1898); "Manuale di Filosofia del diritto" (Milan, 1903), p. 64 et seq.; *Cimbali*, "Diritto naturale" in "Digesto italiano," Vol. IX, Pt. III (Turin, 1899–1902).

our problem, which is to give a definition of objective value of the entire reality of law. This definition, to have objective value, must correspond, not to a particular set of legal theories and propositions, but to all of them which exist or in general are possible. Natural law, whatever its content and however important its authority, always constitutes a special order of juridical rules, founded upon a definite criterion. Belief in it, however, should not prevent recognition of many other criteria and consequently differing juridical propositions. If natural law, therefore, is in a certain sense logically universal and absolute, still it constitutes one of the varieties of law and does not eliminate such variety nor include the whole of law. A system of natural law is, in the last analysis, only a system of law. Logically it joins and completes the others, and increases rather than solves the difficulty of including them all in one definition. From this, the grave mistake of confusing two naturally diverse needs can be seen; and the failure of the attempt to satisfy both at once, by conceiving of natural law not as the ideal rule of law but as the synthesis of all existing law, is at once clearly seen. From this, another important conclusion is derived — that the problem of natural law, which is to-day a question of such lively discussion, is independent of that which concerns us here. Its solution in no wise affects the following chapters.

# CHAPTER IV

## COMMON ELEMENTS OF LAW

UNIFORM AND FIXED PARTS IN THE LAWS OF VARIOUS PEOPLES. — "JUS NATURALE" AND "CONSENSUS GENTIUM." — IMPOSSIBILITY OF LOGICAL SYNTHESIS ON SUCH BASES.

§ 17. *Partial Uniformity of Law. Aristotle.* The distinction of an immutable and a mutable part of law is another important doctrine, aimed to solve law's phenomenological antithesis, which only limits the problem without going to its root. This distinction, clearly outlined by Aristotle and later accepted and developed in Roman jurisprudence, was familiar to all antiquity and is upheld — although perhaps not with its original significance — in the successive developments of juridical thought. Aristotle was not ignorant of the arguments with which natural law was assailed, arguments based chiefly on the fact of the variety of positive law.[1] To overcome this difficulty, he had recourse to a distinction. He admitted that there was natural justice (φύσει δίκαιον), which was not absolutely inviolable, because of the imperfections of human nature. It exerted its power over men, however, without difference or distinction. To this justice he opposed positive law (νόμῳ or θέσει δίκαιον), based upon particular conditions and therefore variable. The part of law derived from nature is common to

[1] What is natural is equal everywhere and always: fire burns equally in Greece and Rome. Law, which is various, is not of nature. Vide "Eth. Nic.," Lib. V, Cap. X (VII in some editions); cf. Lib. I, Cap. I (III).

all States (νόμος κοινός), and the other, founded on accidental circumstances,[2] is peculiar to this or that State (νόμος ἴδιος).

§ 18. *Partial Uniformity of Law. "Jus Gentium."* The concept of a law, common to all peoples, which the Greeks generally accepted but did not subject to a systematic application,[3] became the basis of the Roman theory of "jus gentium." The essential distinction between this and the "jus civile" is that the former is founded on the dictates of the "naturalis ratio" (uniform for all peoples), while the "jus civile" (or "proprium civitatis") comes from separate specific interests.[4] The inductive recognition of the participation of all peoples in a common law (the results of the extension of international relations), was regarded as a proof of the common human nature; while inversely from the fact of our common nature it was deduced that certain norms must be common to all.[5] So, while Roman jurisprudence theo-

[2] Vide "Rhetoric," Lib. I, Cap. XIII. Cf. *Hildenbrand*, "Geschichte und System," § 61; *Filomusi-Guelfi*, "La dottrina dello Stato nell' antichità greca nei suoi rapporti con l'Etica" (Naples, 1873), § 35.

[3] "In general, the universal concept of law common to different peoples . . . is a concept well known to the Greeks, but one to whose development, from a juristic point of view, they did not give their attention." *Leist*, "Græco-italische Rechtsgeschichte" (Jena, 1884), p. 648.

[4] "Omnes populi qui legibus et moribus reguntur partim suo proprio partim communi omnium hominum jure utuntur; nam quod quisque populus ipse sibi jus constituit id ipsius proprium civitatis est vocaturque jus civile quasi jus proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit id apud omnes populos peræque custoditur vocaturque jus gentium quasi quo jure omnes gentes utuntur." "Institutes," I, 2, § 1.

[5] Cf. *Bruns*, "Geschichte und Quellen des römischen Rechts" in "Encyklopädie der Rechtswissenschaft of Holtzendorff," § 16. As to the relations between the essentially Greek concept of "jus naturale" and the essentially Roman concept of the "jus gentium," see *Carle*, "La vita del diritto nei suoi rapporti colla vita sociale," 2 ed. (Turin,

retically distinguished the "jus naturale" from "jus gentium," its practical tendency was to confuse them, considering all the qualifications of both as the logical consequence of either.

§ 19. *Partial Uniformity of Law. Grotius.* In a later age, Grotius followed the same line of thought, and taught that the consensus of all or almost all nations must constitute a means to show "aliquid esse juris naturalis."[6] Thus he, in substance, followed the theory that natural law is nothing but a positive law common to mankind.[7]

§ 20. *Partial Uniformity of Law. Conclusion.* The truth of the facts upon which the doctrine of natural law is based should not deceive us as to its value. If the existence of common elements or uniform ideas in the laws of various peoples is not to be doubted, and if the admission of a common human mind can be made even in juridical matters, it is evident that the construction of the supreme unity of law on these common elements destroys the specific idea of natural law and does not solve the logical problem of definition. In the first place, such a process is closely connected with the methodical instance of the sceptics, inasmuch as it

1890), pp. 152–67. The works of *Voigt* go to the bottom of this subject; "Die Lehre vom jus naturale, æquum et bonum und jus gentium der Römer" (Leipsic, 1856–75); and of *Hildenbrand*, "Geschichte und System," Bd. 1.

[6] "De Jure Belli ac Pacis," Lib. I, Cap. I, § 12; cf. id., § 14.

[7] This point, although of capital importance, was not made clear by the school of natural law which left the relations of "jus naturale" and "jus gentium" in doubt. Cf. *Pufendorf*, "De Jure Nat. et Gent.," Lib. II, Cap. III, § 23; *Thomasius*, "Fund. Jur. Nat. et Gent.," Lib. I, Cap. V, §§ 60–61, 65–70. Also the thought of Grotius is not always explained in the same way. Vide, for example, "De Jure Pacis ac Belli," Proleg., § 17 (18), and Lib. II, Cap. XX, § 41. For the diverse meaning of the "jus naturale" in relation to the "jus gentium" attributed to Grotius, cf. *Hartenstein*, "Darstellung der Rechtsphilosophie des Hugo Grotius" (Leipsic, 1850), p. 504 et seq.

admits that natural law, in order to exist, must have positive value and that, too, to an equal extent among all nations.[8] This theory deprives natural law of its essential and characteristic requisite, its absolute value "per se," which puts it in opposition to positive law in place of making it but a repetition of the latter. The strength of this antithesis once eliminated, and an admission made that the "jus naturale" should be confirmed and seconded by an effective "consensus gentium," in other words, that it should be part of the "jus civile," it loses its separate function and becomes a mere useless mental repetition. On the other hand, it is no less clear that a comparative study of the common elements of positive law cannot lead to a complete logical synthesis. Some particular elements of law are shown by historical observation to be diverse — not reducible to common element. Neither does it help the argument to say that the differences between the legal systems of various peoples are only in external form or in secondary and accidental modality; because historical research shows in the last analysis (in conformity to a categorical law of thought) that what seems accidental and secondary is a rational adjunct and cannot be considered as uninfluenced by the underlying cause. Furthermore, an objective definition must comprehend all the realty of the object without exception; the concept of law cannot be truly defined unless the definition corresponds in effect to all manifestations of juridical phenomenology, and not only to those which are, or are thought, principal and constant.[9]

[8] Thus, too, the Sophists held that the mark of a law of nature was, or should be, its univeral acceptance. For example, *Xenophon*, "Memorabilia," Lib. IV, Cap. IV: "'Αγρέφους δὲ τινας οἶσθα, ὦ Ἱππία, νόμους; τοὺς γ'ἐν πάσῃ, ἔφη, χώρᾳ κατὰ ταὐτὰ νομιζομένους." Cf. Cap. II, ante, p. 8.

[9] For the importance from another point of view of the stable and universal element of positive law, see Chap. VII, post, p. 58.

# CHAPTER V

## LEGAL GROWTH

THE SERIES OF HISTORICAL CHANGES AND THE STUDY OF THE LAWS OF ALTERNATION. — THEORY OF FLUX AND REFLUX. — LACK OF SYSTEMATIC HISTORICAL UNIFICATION.

§ 21. *Juridical Modifications are Systematic.* Other ways of reducing the innumerable historical variations of law to unity must be tried, since we have shown the insufficiency of those which we have considered. The series of political changes which have taken place in every State from time to time, necessarily give rise to a question as to whether they are not governed by a fixed law. The uniform regularity, which is not found in the legal institutions, differing in different ages, may depend upon a higher principle, that is *on the order of their modification.* Thus, the old concept of certain natural laws controlling the acts of mankind is rehabilitated, though understood in a different way.

§ 22. *Political Modifications. Plato.* Plato, in his "Republic," [1] convinced that everything which is created must in time perish, investigated the principles of political transformations in general and made the first synthesis of such modifications. Constitutional changes take place, he claims, in conformity with the nature of the system, according to psychological motives. It may be doubted, however, if Plato, in outlining the

[1] Lib. VIII, Cap. III (546).

successive stages from one form of government to another, had intended to give a true and exact historical law.[2]

§ 23. *Historical Modification. Aristotle.* Aristotle, interpreting the Platonic system in this sense, confuted it and pointed out that it did not include or exactly correspond to all of reality.[3] As a matter of fact, there is no proof that aristocracy (as Plato taught) gives place to democracy, and that to tyranny. Political changes can follow any other order, as Aristotle showed, taking advantage of the historical knowledge of his day. He does not, however, formulate any synthetic law of historical change, but merely gives some causes, more or less general, upon which constitutional changes depend.[4] Notwithstanding that these attempts to define exactly the apparently unconnected laws governing political changes showed the great difficulty of the undertaking, attempts at synthetic historical reconstruction have been made in all ages.[5]

[2] For reasons for this doubt, see *Hildenbrand*, "Geschichte und System," § 27; cf. *Filomusi-Guelfi*, "La dottrina dello Stato," p. 60.

[3] "Politics," Lib. VIII (or V in some editions), specially Cap. X.

[4] "Politics," Lib. VIII, and cf. *Hildenbrand*, "Geschichte und System," §§ 102–7; *Filomusi-Guelfi*, "La dottrina dello Stato," § 71–72.

[5] On the principal system of the kind, see *Rosmini*, "Filosofia della Politica," 2d ed., (Milan, 1858), Lib. IV, Cap. 17; *Cavagnari*, "Saggio di Filosofia giuridica secondo i canoni della scuola storica" (Bologna, 1865), Cap. VI; "Il nuovo diritto degli individui e dei popoli" (Padua, 1869), p. 419 et seq.; *Marselli*, "La scienza della storia," I, "Le fasi del pensiero storico" (Turin, 1873); *Miraglia*, "La legge dei mutamenti politici" in "Atti della R. Accad. di Napoli," Vol. XX, 1886. Cf., too, *Ferrari*, "Corso sugli scrittori politici italiani" (Milan, 1862); *Cantoni*, "G. B. Vico. Studii critici e comparativi" (Turin, 1867); *Flint*, "The Philosophy of History in France and Germany" (London, 1874); "G. B. Vico" (Florence, 1888); *Bluntschli*, "Geschichte der neueren Staatswissenschaft," 3 ed. (Munich, 1881); *Janet*, "Histoire de la science politique dans ses rapports avec la morale," 3d ed. (Paris, 1887).

§ 24. *Historical Modification. Vico and his Doctrine of Flux and Reflux.* While Polybius, and after him Machiavelli, Bodin and Campanella, believed in such a circular recurrence of political constitutions, Vico taught an analogous, but greater and more profound theory, that, as all nations have a common nature, so their history must of necessity follow a uniform course, and it must be possible to discover the "ideal eternal history, which all nations complete in the ages." This is the object of the "scienza nuova," which, Vico said, must be both the history and the philosophy of mankind. The flux and reflux of nations form, therefore (we again quote Vico), "a universal and immutable law, governing history and arising in the constitutional uniformity and constancy of the human mind." "Human institutions" have a tendency (avvicendamento), "which they not only have always had to follow in the past, but must follow now and will have to follow in the future, no matter what infinite worlds are born of eternity from time to time." No conception can be grander than this; but it is easy to see its weakness, both absolute and relative to our problem. In the first place, such an historical systematism (as it was well named by Cantoni) is disproved by experience. For, the development of various peoples is not uniform in all civilizations, and some peoples do not pass, as Vico claimed, through three ages of definite length, to which three kinds of nature, custom, law, government, language, authority, and reason correspond.[6] History, the kingdom of the individual, which always varies (for the very reason, to follow Vico's glorious reasoning, that it is made by men), does not tolerate such theories of systemization and does not lend itself to geometrical

[6] See, especially, "Principj di scienza nuova d'intorno alla comune natura delle nazioni," 2d ed., Lib. IV; and cf. *Cantoni*, "Vico," p. 230 et seq.

configurations or preconceived symmetries. It rebels against every mechanical formula to which we try to subject it, because of its irresistible innate transfiguration and development. By its nature, it is always undergoing transformation and development. Hence it is, that no scheme of systematic unification can hope for complete success, and all general syntheses, intended to include the past and future of humanity, no matter how lately revised, are always discredited.

§ 25. *Historical Modification. Vico's Doctrine a Denial of Progress.* One of the logical conclusions from the doctrine of a circle or circular periods showing a uniform and invariable course of humanity, which we must point out, is its denial, in the last analysis, of all true historical development. It tends to liken the development of human relations to that of inorganic bodies, holding that the regularity of both kinds is similarly constituted. Acts of man and changes in things would have the same relation — essentially passive — to their laws; nations would fulfill their cycles as planets complete their orbits. This is clearly a denial of development and spontaneous growth, which are characteristic not only of human acts but of organic facts in general (although the former are superior to the latter by qualities unnecessary to mention here). The idea of life, with all its rich variety of possible explication, escapes systemization in fixed cycles, which are but false objectivations or projections "sub specie æternitatis" of facts existing "in certain forms in certain ages," [7] and are real only to that extent.[8] It can be easily seen how the doctrine

[7] Vico.

[8] On this proposition *Romagnosi*, sustained by his profound knowledge of history, wrote the following clear exposition: "I am far from being able to persuade myself that such circular development can take place (not in the extrinsic form and material vestment,

of constant cycles or periods necessarily excludes belief in any effective progress or advance by humanity. Between the two conceptions, whatever be thought to the contrary,[9] there is a true and insurmountable antithesis. The former is substantially equivalent to *immobilism*. It definitely synthesizes history, including it in the rigid form of a model. It cannot follow reality as a vital entity and denatures it in reducing it to a system. The doctrine, however, which represents social life as a true progressive development, conforms to truth and does not run counter to the spontaneous activity of historical forces. But this theory falls short of the other ideal end of gathering all facts into a synthetic scheme. By not attempting to limit the modification of historical reality, it must fail to define the concept accurately. The moment one yields to the unifying instinct of the human mind, and attempts dialectically to formulate

as I might say, of government, but in the real growth of the civil lives of nations), according to which, the quality of the people's mind and heart, by which laws, customs, modes of happiness and sorrow follow one another in regular succession; on the contrary, I believe that they undergo metamorphoses, that their state, despite similar form of government, acquires such differences and accidentals, that what succeeds can in no wise be likened to what has preceded. "Della vita degli Stati," § 1057, in De Giorgi's edit. of his "Works," Vol. III, Pt. II (Milan, 1845). This theory of Romagnosi is explained more in detail in his "Osservazioni sulla scienza nuova di Vico" in "Opuscoli su vari argomenti di diritto filosofico," § V. *Carle*, too, does not accept Vico's idea of a reflux in social and human affairs. Vide "La vita del diritto," p. 200 et seq.; "La Filosofia del diritto," p. 161 et seq.; and cf. his "Le leggi storiche e la libertà dell' uomo," in "Saggi di Filosofia sociale" (Turin, 1875), p. 27 et seq.

[9] Vide, for example, *Tommaseo*, "G. B. Vico," in "Studii critici" (Venice, 1843), p. 124 et seq.; *Sarchi*, Preface to his edition of Vico's "Dell' unico principio e dell'unico fine del diritto universale" (Milan, 1866), p. xxi et seq.; *Siciliani*, "Sul rinnovamento del Filosofia positiva in Italia" (Florence, 1871), p. 83.

all phases of progress, past, present and future, one meets objections analagous to those given against the theory of flux.[10] So, what this method gains in universality it loses in accuracy. The ideal determination of historical synthesis is bought at the cost of truth.

§ 26. *Historical Modification; Approximate Systemization — Which Alone is Possible — Cannot Be the Basis of Definition.* The study of the rules of change in human affairs (and, therefore, in law) cannot lead to a sufficient

[10] For these objections, see *Schelling*, "Ist eine Philosophie der Geschichte möglich?" in "Sämmtliche Werke," 1 Abth., 1 Bd., p. 466 et seq.; "System des transcendentalen Idealismus" (ib.), III Bd., p. 587 et seq.; *Rosmini*, "Filosofia della Politica," Lib. IV, Cap. 17; *Cantoni*, "Vico," p. xv et seq., 234 et seq. For a general criticism of the law of history, see *Rümelin*, "Ueber den Begriff eines socialen Gesetzes" in "Reden und Aufsätze" (Tübingen, 1875), p. 1 et seq.; "Ueber Gesetze der Geschichte" (ib.), Neue Folge (Freiburg, 1881), p. 118 et seq.; *Dilthey*, "Einleitung in die Geisteswissenschaften," I Bd. (Leipsic, 1883), pp. 116–141; *Wundt*, "Logik — Eine Untersuchung der Principien der Erkenntniss und der Methode Wissenschaftlicher Forschung," II Bd., II Abth., 2 ed. (Stuttgart, 1895), p. 129 et seq., 340 et seq., 382 et seq.; *Sigwart*, "Logik," 3 ed. (Tübingen, 1904), II Bd., § 99, p. 629 et seq.; *Boutroux*, "De l'idée de loi naturelle dans la science et la philosophie contemporaines" (Paris, 1895), Cap. XIII; *Rickert*, "Die Grenzen der naturwissenschaftlichen Begriffsbildung" (Tübingen, 1896–1902); *Petrone*, "I limiti del determinismo scientifico," 2d ed. (Rome, 1903), VI; *Naville*, "La notion de loi historique" in "Revue de synthèse historique" (Paris, 1904); *Simmel*, "Die Probleme der Geschichtsphilosophie," 2 ed. (Leipsic, 1905), Cap. II. Vide, also, on this subject the discussion between Xenopol, Berr, Simiand and Croce in the "Revue de Synthèse historique," June, 1902, February, April and June, 1903; and *Croce*, "Il concetto della storia nelle sue relazioni col concetto dell' arte," 2d ed. (Rome, 1896); "Materialismo storico ed economia marxistica" (Milan, 1900), p. 13 et seq.; "Estetica" (Milan, 1902), p. 42 et seq.; *Salvemini*, "La storia considerata come scienza" in "Riv. ital. di Soc.," A. VI, Fasc. I, 1902; *Xenopol*, "Sociologia e storia" in "Riv. ital. di Soc.," A. VI, Fasc. IV, 1904; cf. the "Année sociologique," VII (Paris, 1904) p. 147 et seq.

definition of the institutions themselves. Analogies and regularities or variations are so limited that only by a disregard of their limitations resulting in inaccuracy can one include all the complex and multiplicate variety of human history in a fixed scheme. This does not mean, of course, that certain syntheses of historical, and particularly of juridical, evolution cannot be made in this way. This point we will take up at a later time.[11] Our meaning is, that syntheses of this sort, being essentially incomplete, do not give the ultimate essence of things or comprehend its universality.

[11] Cf. Chap. VII, p. 58, post.

# CHAPTER VI

## CONNECTION BETWEEN LAW AND HISTORICAL CONDITIONS

THE MOULDING OF LAW UPON CIRCUMSTANCE AS A POLITICAL CRITERION AND AS A NATURAL FACT. — SIGNS OF THE PENETRATION OF THIS CONCEPT INTO THE SCIENCE OF INDIVIDUAL AND SOCIAL RELATIONS. — IDEA OF HISTORICAL DEVELOPMENT. — THEORY OF PROGRESS. — THE GERMAN HISTORICAL SCHOOL AND THE SCIENTIFIC EXPLANATION OF THE VARIETY OF LAW. — CONTEMPORANEOUS THOUGHT AND NEW CONFIRMATION OF THE HISTORICAL RELATIVITY OF LAW.

§ 27. *Law is Relative.* One of the surest ways to arrive at a scientific explanation of the variety of law is to study the relations by which it is bound to specific conditions of time and place. It is primarily evident in politics that law should be adapted to the condition of the people which it controls. In every age, lawmakers should take environment into consideration and endeavor to make laws meet social needs. As law is objective by nature, its correlation with historical conditions has always been recognized as a practical necessity for governments. The idea that laws are connected *naturally* with the circumstances to which they are applied and therefore, independently of the preconceived notions of their makers, they ought to be fashioned in accord with all other elements of culture, represents an ulterior phase of thought and is essentially modern.

§ 28. *Relativity of Law. Greece and Rome.* Signs of such a belief, however, can be found in earlier ages. Hippocrates, in "Περὶ Ἀέρων, Ὑδάτων, Τόπων," made a

rational attempt to explain the variety of customs through the action of climate and physical conditions.[1] Plato, no stranger to the idea of historical development,[2] taught that political constitutions are the results of customs.[3] Aristotle showed a marvellous sense of relativity in discussing the means and limits of legislative progress,[4] in his critique of constitutions and throughout his "Politics."[5] The same intuition of historical relativity can be found in all the legal and political work of the Romans, who, not only in theoretical formulization, but even more in practical application, showed a fine appreciation of the close ties between law and all the conditions of social life.[6]

[1] *Chiappelli*, "Sulle teorie sociali dei Sofisti greci," p. 464. The singular coincidences of the treatise by Hippocrates and the Darwinian theory are here noted.

[2] For this less considered phase of Platonic thought, see *Fragapane*, "Il problema delle origini del diritto," pp. 35–43.

[3] "Repub.," Lib. VIII, Cap. II (544D).

[4] "Pol.," Lib. II, Cap. V, §§ 10–14.

[5] Vide "Nic. Ethics," esp. Lib. V, Cap. X, 1135a, where laws of weights and measures are compared, which vary according to place because of the different economic situations. "Τὰ δὲ κατὰ συνθήκην καὶ το συμφέρον τῶν δικαίων ὁμοιά ἐστι τοῖς μέτροις· ου γαρ πανταχοῦ ἴσα τα ὀινηρὰ καὶ σιτηρὰ μέτρα, ἀλλ' οὗ μὲν ὠνοῦνται, μείζω, οὗ δὲ πωλοῦσιν, ἐλάττω." Aristotle's use of the comparative method, which renders his treatises still useful, is noteworthy. Cf. *Dilthey*, "Einleitung in die Geisteswissenschaften," p. 289 et seq.

[6] Inst. I, 2, § 2. "Nam usu exigente et humanis necessitatibus gentes humanæ quædam sibi constituerunt," etc. In a remarkable passage of *Aulus Gellius*, the jurisconsult Sextus Cecilius thus addresses Favorinus, the philosopher, "Non ignoras legum opportunitates et medelas pro temporum moribus et pro rerum publicarum generibus, ac pro ultilitatum præsentium rationibus, proque vitiorum, quibus medendum est, fervoribus, mutari ac flecti, neque uno statu consistere, quin, ut facies coeli et maris, ita rerum atque fortunæ tempestatibus varientur." "Noctes Atticæ," XX, 1. Cf. *Hegel's* comment in "Grundlinien der Philosophie des Rechts," p. 28 et seq. *Arnold* is right, "It was natural that the Roman jurists

§ 29. *Relativity of Law. The Middle Ages.* The recognition of the diversity of law because of the diverse circumstances of life continued during the Middle Ages. It was governed by the most rigid dogmatism, although it was affected by a belief in a law of nature immutable and above the changes of positive law. Thomas Aquinas, who, in speculating on the "lex naturæ," finally denied the name of law to all positive statutes which were not in accord with it,[7] recognized elsewhere that a certain variety of law should correspond to the variety in human affairs.[8] So, at the renaissance of legal phil-

did not write long discourses about the connection of law and life, for they had it before their eyes every day, and memory, which could not recall its absence, thought nothing else possible." "Cultur und Rechtsleben" (Berlin, 1865), p. 212. The historical and practical feeling of the Romans was clearly emphasized by Ihering in "Geist des römischen Rechts auf verschiedenen Stufen seiner Entwicklung," 5 ed. (Leipsic, 1891–99). Cf. *Carle*, "Le origini del diritto romano" (Turin, 1888), Lib. I, and "La vita del diritto," § 209.

[7] "Omnis lex humanitus posita . . . si in aliquo a lege naturali discordet jam non erit lex sed legis corruptio." "Summa Theologia," I, 2, Qu. 95, Art. 2.

[8] "Dicendum, quod principia communia legis naturæ non eodem modo applicari possunt omnibus propter multam varietatem rerum humanarum et ex hoc provenit diversitas legis positivæ apud diversos." "Summ. Theol.," I, 2, Qu. 95, Art. 2, Ad. 2. Cf. *Haring*, "Der Rechts- und Gesetzesbegriff in der katholischen Ethik und modernen Jurisprudenz" (Graz, 1899), §§ 8–10. Vide *Vadalà-Papale*, "Le leggi nella dottrina di S. Agostino e S. Tommaso" (Catania, 1894), Cap. IV. This belief was illustrated by *Dante* in a memorable passage: "Habent namque nationes regna et civitates inter se proprietates quas legibus differentibus regulari oportet. Est enim lex regula directiva vitæ. Aliter, quippe, regulari oportet Scythas qui extra septimum clima viventes et magnam dierum et noctium inæqualitatem patientes intolerabili quasi algore frigoris premuntur; et aliter Garamantes qui sub æquinoctiali habitantes et coæquatam semper lucem diurnam noctis tenebris habentes ob æstus æris nimietatem vestimentis operiri non possunt." "De Monarchia," I, 16. Dante's profound insight into the function of law which

osophy at the end of the Middle Ages, theoretical research was generally prompted by practical and, more specifically, by political purposes; the study of objective relations was to a certain extent directed to the promotion of the art of government. Thus, two principles control Machiavelli, or rather two aspects of one thing. Men should study their times and bow to opportunity. In history there is a law of continuity, by which every State or thing leaves projecting stones upon which the next must build.[9] This theory shows on one hand a natural fact and on the other outlines a plan of action.[10]

resulted in his celebrated definition, "Jus est realis ac personalis hominis ad hominem proportio, quæ servata hominum servat societatem, corrupta corrumpit," is seen in this passage, in which, according to *Kohler*, "a loftiness of view in regard to natural law was attained which was not again reached until Hegel's time." "Rechtsphilosophie und Universalrechtsgeschichte" in Holtzendorff's "Encyc. der Rechtswissenschaft," 6 ed., § 1. Cf. *Carle*, "La vita del diritto," p. 232 et seq.; "La Filosofia del diritto," I, p. 101 et seq.; *Vadalà-Papale*, "Le leggi nella dottrina di Dante Alighieri e di Marsilio da Padova" (Turin, 1898). We may note, also, that Dante elsewhere compares language with custom to show their equal mutability; "Omnis nostra loquela . . . nec durabilis, nec continua esse potest; sed sicut alia, quæ nostra sunt, puta mores et habitus, per locorum temporumque distantias variari oportet," "De Vulgari Eloquentia," I, 9.

[9] *Carle*, "Prospetto d'un insegnamento di Filosofia del diritto" (Turin, 1874), p. 43. With a purpose analogous to Machiavelli's, another eminent statesman, *Bodin*, studied the relations which should exist between the regulations of a people and the natural conditions in which it lives. Vide "De Repub.," Lib. V, Cap. I, "De conformando civitatum statu pro regionum ac populorum varietate, quibusque disciplinis populorum mores dissimilesque naturæ percipiantur," where the effects of climate, geography, and therefore of the nature of each people and its political life and constitution, are studied. Cf. *Fournol*, "Bodin, prédécesseur de Montesquieu" (Paris, 1896), Cap. IV.

[10] Bacon used this test in defining the relation of ethics to the science of nature.

§ 30. *Relativity of Law. Vico.* If we omit the partial observations and applications, which, however ingenious they may be, do not correspond to a full scientific knowledge of the subject, we may say that the study of actual relations between law and the sum of historical conditions have not really occupied human thought except during the past two hundred years. Vico and Montesquieu were the first to advance the theory that the differences in the laws of diverse people were the results not of chance or man's caprice but of certain natural, necessary, and constant causes, which science could and should discover and explain. In this both writers represent an anticipation which their age could but imperfectly understand. Two opposite principles were in Vico's mind, giving his thought two distinct sides. A dogmatic mind and well-reasoned belief in eternal ideas contained in the infinite mind of God[11] led him to speculate about the transcendental; and a profound historical sense, such as no one before him possessed, led him to seek the slow and complex formation of human affairs in the obscurity of the past. The general character of his work is the result of the union of these opposite qualities. It shows a constant and sincere effort to mould the multitude of divergent empirical data into ideal designs, conceived "a priori." Thus looked upon "sub specie æternitatis," or to use Vico's own words, "described from the point of view of Providence," history was the same as philosophy. Such is the object of the "Scienza nuova." But, as

[11] For the theological character of Vico's doctrines, even those in respect to law, see *Flint*, "Vico," Cap. VII, p. 160 et seq.; cf. p. 198 et seq., p. 213 et seq. We must not forget that civil theology was one of the many names given his new science by Vico himself; cf. *Cantoni*, "Vico," p. 226. For a criticism of Vico's system from a religious point of view, see *Labanca*, "G. B. Vico e i suoi critici cattolici" (Naples, 1898).

we have said before, Vico's systematism, which led to his doctrine of the flux and reflux of nations, was not true to fact, and is in contrast even with the other fundamental motive or theory of his work. The second and strictly historical phase of Vico's thought is the most original and rich.[12] In it, he discloses his theory of the birth of things "in certain times and in certain guises" and conceives of the genesis of human facts in their concrete and determinate individuality and with their intrinsic connections. He reached a synthetic vision of the human world which none attained before him. By studying the elements of social life in all forms and aspects — from language to religion, from custom to government,— we intuitively grasp the historical causes of law, which bind it to the psychological state of nations and contain its true and necessary extrinsification. In our mind, Vico's best intuition was the consideration of juridical regulations as a reflex from the minds of nations; which enabled him to hold — a stupendous thing in his day — that law, being based on human nature, was first revealed in custom, and later by successive developments reached the fully developed form of legislation.[13] But Vico was not

[12] For a critical reconstruction, see *Fragapane*, "Il problema delle origini del diritto," pp. 79–89.

[13] In this regard, Vico is the forerunner of the whole historical school. His philosophical grasp of law is, however, much larger and deeper than that of the school of German jurists. *Carle* is correct in stating that it is a great mistake to think "that Vico belongs to the school which would found law on historical development." "Prospetto d'un insegnamento di Filosofia del diritto," p. 60. The cardinal doctrines of "De uno universi juris principio et fine uno" do not leave a doubt on this point. Cf., for an exact and lucid epitome of Vico's philosophico-juridical thought, *Filomusi-Guelfi*, "Del concetto del diritto naturale e del diritto positivo," p. 29 et seq.; "Del concetto della enciclopedia del diritto," p. 10 et seq.

successful in adequately expressing his vast historical conception of law, and this for many reasons. In the first place, his tendency to systematism, which we have already noted, hindered him by destroying the objectivity of his observations and by leading him into forced interpretations and arbitrary co-ordinations.[14] In the second place, his lack of critically proven historical material interfered with his work. This lack, we may note, affected comparative as well as historical matter.[15] And, finally, to omit other hindrances, he was affected by his genius which was irregular and intuitive.[16] His work must be appreciated more in its intention than in its execution; more as a scientific program than as a true and strict scientific treatise. It promulgated a new system of research, of which it offers a rough sketch (not to say, with Romagnosi, "a phantastic outline"). Until it was given a fresh impulse through the transformation of historical studies by the vast science of civil psychology [17] it remained almost uncomprehen-

[14] See especially on this point "Osservazioni sulla scienza nuova di Vico," by *Romagnosi*.

[15] *Ferrari*, in "La mente di Giambattista Vico" (Milan, 1837), calls attention to the old-fashioned character of Vico's education, which was an anachronism. Vide, esp., Pt. II, Cap. VIII. Cf. *Cantoni*, "Vico," Pt. II, Cap. VIII, where he strongly, and with reason, criticizes Vico on this point.

[16] Cf. *Scolari*, "Instituzioni di scienza politica" (Pisa, 1871), p. 37 et seq. *Flint* thought that imagination was the predominant element of Vico's mind, and added that "he never acquired the power to restrain his imagination or to distinguish between the possible, the probable, and the certain, or to know when a proposition was sufficiently proven and when not, or to put his thoughts in order and to give his proofs in a distinct and easy manner." "Vico," Cap. IV, p. 43 et seq. This criticism is far from exaggerated.

[17] *Vadalà-Papale* in "Dati psicologici nella dottrina giuridica e sociale di G. B. Vico" (Rome, 1889) treats of him as the founder of the psychology of law and of social psychology or that of nations.

ded.[18] Only with the recognition in different ways and for other reasons of an historico-psychological need, realized before its day by Vico, did his work begin to be given its true and full value.

§ 31. *Relativity of Law. Montesquieu.* "L'Esprit des lois," Montesquieu's masterpiece, which indubitably marked a new step in the historical interpretation of law,

Cf., too, *Fragapane*, "Il problema delle orgini del diritto," p. 78 et seq. *Carle*, who has in his various works developed and elaborated in modern form some of Vico's most profound doctrines, said that "because of his largeness of vision, he had the singular fate of appearing to some as the philosopher of history, and to others as a psychologist," while "his greatness lay in being both. On this account he should be considered, if not as the founder of sociology, as some would have it, at least as the most discriminating forerunner of a true comprehensive science of social relations and, therefore, he could justly call his book 'Principji di una scienza nuova,' for such it was." "La Filosofia del diritto," I, p. 28.

[18] We must not ignore the fact that Vico's thought has had a consistent following in Italy. It is due to him that some writers of the 1700's brought a profound historical and philosophical criticism to bear on the study of civil affairs. Among these are *Stellini*, "De ortu et progressu morum" (1740), *Duni*, "Origine e progressi del cittadino e del governo civile di Roma (1763), "La scienza del costume o sia sistema sul diritto universale" (1775), *Pagano*, "Saggi politici dei principi, progressi e decadenza delle società (1783–1792), and, to a certain extent, *Filangieri*, "Scienza della legislazione" (1780–88); then at the beginning of the following century, *Cataldo Janelli*, "Sulla natura e necessità della scienza delle cose e delle storie umane" (1817). Cf., on these writers, *Cantoni*, "Vico," Pt. III, Cap. XVI; *Siciliani*, "Sul rinnovamento della Filosofia positiva in Italia," Lib. I, Cap. I, II. On Janelli, in particular, see also the famous essay by *Romagnosi*, "Cenni sui limiti e sulla direzione degli studi storici," a preface to the second edition of Janelli's works (Milan, 1832); *Fragapane*, "Obbietto e limiti della Filosofia del diritto," II (Rome, 1899), p. 106 et seq.; *Gentile*, "Dal Genovesi al Galluppi" (Naples, 1903), pp. 56, 68–70. Janelli foreshadows the great progress since 1800 in history and philology. See his book cited, § II, Cap. XII.

was in this respect premature. This explains its merit and its unavoidable imperfections. Montesquieu proposed to go to the bases of positive law. He connected the study of law with the study of the natural conditions of life.[19] The crisis even then immanent in France constituted an historical state suitable for deductive and strictly rationalistic work. But vast numbers of particular studies of the various sides of social life were lacking, and these alone could have made the realization of Montesquieu's philosophic design possible. This is the reason for its fragmentary and unproportioned character and the imperfect application of its general principles. And this also explains how his analysis (elsewhere inaccurate) of the English constitution, which he held up as a model and example for other nations, was read and followed by his contemporaries more than the fundamental conception of the physical and social relativity of law, for it better suited the condition of minds wherein the Revolution was gestating.

§ 32. *Continuity of History.* The tendency to connect the study of man with that of nature found expression in Germany in the age of the "Aufklärung." Moved by a concept similar to Montesquieu's, J. G. Herder was among the first to understand and trace the continuity of history and to appreciate the specific force of tradition, which he called the substratum of govern-

[19] "The chief characteristic to my mind of this memorable work ("L'Esprit des lois") is its predominant tendency throughout to consider political phenomena as necessarily subject to invariable natural laws like all other kinds of phenomenon," writes *Comte*, "Cours de philosophie positive," Vol. IV, Lecture XLVII, p. 243. But, as he points out, Montesquieu but imperfectly understood the concept of historical formation. On this point, see *Fragapane*, "Obbietto e limiti della Filosofia del diritto," I, p. 46 et seq. *Liepmann's* judgment is even more severe. "Die Rechtsphilosophie des J. J. Rousseau" (Berlin, 1898), p. 62 et seq.

ment and of all institutions.[20] Thus, from simple observation of the mutability of human institutions came little by little the idea of their true and proper historical development. This idea was not possible before a fixed relation between human events and the conditions in which they take place was recognized. Such recognition was long in supplanting the belief in the causality or caprice of facts themselves. The passage from one concept to the other was not made in one step, for the first attempts to determine the system of variation led, as we have seen, to the creation of a fixed and quasi-geometrical order, that is, to a mechanical and inorganic concept. An attentive observer could see in this a residuum or alteration of the earlier unscientific conception of arbitrium or chance, for the law of variation was considered extrinsic to the variable facts rather than resulting from their natural constitution. It did not set forth an internal causality or inherent property. And it did not give, therefore, a real explanation of facts but only the dogmatic hypostasis of a superior will, which determined the series of change in its own caprice.

§ 33. *Historical Modification Governed by Internal Law.* It was, therefore, only in a more advanced age of scientific thought that the naturalness of social facts could be considered without dogmatic prejudices, by studying them with those objective criteria, which had given such good results in the physical sciences. The law of historical transformation was considered as

[20] On the works of *Herder*, "Ideen zur Philososphie der Geschichte der Menschheit," see two editions of *Kant* in Kirchmann's edit., "Philos. Bibl.," Bd. 47. Cf. *Flint*, "The Philosophy of History in France and Germany," Cap. IV. For a critico-comparative valuation of Herder's thought, see *Jouffroy*, "Bossuet, Vico, Herder," in "Mélanges philosophiques," 2d ed. (Paris, 1838.)

inherent in the facts themselves, as immanent and not transcendent. And the successive phases of institutions were looked upon in their organic character as moments of the vital development of their nature.[21] The formation of a science of economics was the factor and mark of this intellectual revival. The work of the physiocrats and, in general, of the early economists is, in this respect, more relevant because, as Gabba points out,[22] the discovery of constant laws governing economic phenomena was the first instance in which modern thought saw and grasped the possibility of an objective and experimental science of human facts and the exterior manifestations of human liberty. The doctrine of progress, which appeared about 1750, was a philosphical synthesis and idealistic dream founded on the concept of historical development, which emerged from such objective study. In the belief that continuous and co-ordinated changes of human society always mark an advance on the road to perfection, there was, without doubt, a reflection of the metaphysical habit, which still dominated consideration of social facts.[23] A proof of this is that in a more recent age, marked by a strong anti-metaphysical reaction, the theory of progress was subjected to bitter criticism

[21] See, in this regard, the historico-critical analysis of *Gabba*, "Intorno ad alcuni più generali problemi della scienza sociale," Vol. III (1876–87), "Dell' indirizzo e delle condizioni odierne degli studii intorno alle scienze sociali," esp. Vol. I, Lect. I, "Dell' indirizzo e delle condizioni odierne degli studii intorno alle scienze sociali"; *Dilthey*, "Einleitung in die Geisteswissenschaften," p. 475 et seq.; and *Fragapane*, "Obbietto e limiti della Filosofia del diritto," Vol. I, Cap. II.

[22] *Gabba*, "Alcuni più generali problemi," I, p. 16.

[23] In this sense, the critical observations by *Comte* in "Cours de philosophie positive" Vol. IV, p. 366 et seq. should be remembered. Although Comte himself denied the unlimited perfectibility of the human race, he admitted a constant amelioration as a fact normally correlative to that of social evolution. Ibid., p. 381.

aimed to destroy or lessen its value.[24] While there may have been some improper and unscientific elements in the first doctrine demanding correction and reservation,[25] it is certain that the reaction was ill-considered and excessive. It lost sight of the true and general character of the facts observed, through an all-absorbing fear of abstraction and a cringing obsequiousness to separate empirical data.[26] Furthermore, we must remember that the doctrine of the progressive movement of humanity was, from the first, intended to supplant and reverse the theological doctrine of the Fall, whose immense authority it was almost impossible to overcome. The doctrine of progress corrected a traditional doctrine by a rational hypothesis aimed to simplify and explain the undeniable fact of civilization. It would be wrong to ignore the value and truth of the doctrine because of some inaccuracies or partial exaggeration.

§ 34. *Unity of History.* Turgot was the first to have a clear and profound idea of the new concept which,

[24] *Maine* believes that after a certain stage in the formation of law is reached, that is, when the norms have been reduced to writing, most societies remain stationary and only the exceptional few continue to feel the need of progress. See esp. "Ancient Law" (London, 1891). Cf. *Vanni*, "Gli studi di H. S. Maine e le dottrine della Filosofia del diritto" (Verona, 1892), § 7; "Prime linee di un programma critico di Sociologia" (Perugia, 1888), p. 66; "Lezioni di Filosofia del diritto" (Bologna, 1904), Pt. III, Cap. IV.

[25] For a critical revision in this sense, see the authors cited in n. 10, ante, p. 30.

[26] As a verification of this proposition we have the enlightening observation of *Lasson*: "The unfortunate fact occurs in every branch of knowledge that whoever depends on experience and experience alone, will, on the most certain phenomenic fact, miss the mark or fall into contradiction, because of some preconceived notion, prejudice or so-called sound commonsense." "System der Rechtsphilosophie" (Berlin, 1882), p. 442. — We will speak of some of the more definite and notable aspects of juridical progress later; § 106, et seq., post.

notwithstanding its later qualifications and elaborations, was destined to remain fundamental henceforth in the study of social phenomenology. He conceived of human progress as a spontaneous development based on the inter-action of all things and more particularly on the tradition of culture. Studying the various elements in the life of a people — science, art, government, customs, morals, law, religion — Turgot saw that their conditions at a definite time were intimately interwoven, that there was a constant reciprocity of action between the forces which operate in society. At the same time, he saw that all these inter-connected elements were slowly transformed, through various phases, each one of which represented a new elevation of human nature.[27]

§ 35. *Historical Progress. Kant.* The same idea of progressive historical development was later upheld more enthusiastically but less scientifically by Condorcet in his celebrated work, "Esquisse d'un tableau historique

[27] "All the ages," wrote *Turgot* in one of his "Discours sur les progrès successifs de l'esprit humain" (1750), "are connected by a causal chain which binds each to its predecessors. The increasing power of language and letters, by giving men the means of making sure of the possession of their ideas and of communicating them to others, has made a common treasure of all the particular branches of knowledge, which every generation hands on as a heritage constantly increased by new discoveries; and the human race, considered from its beginning, appears to the eyes of a philosopher as an immense whole, which, like an individual, has its infancy and its ages." "Œuvres de Turgot," new ed. (Paris, 1844), Vol. II, p. 597 et seq. In these and in other analogous ideas of Turgot can be found, as *Ferneuil* observes, the germs of the historical method. "Des principes de 1789 et la science sociale" (Paris, 1889), p. 6 et seq. Cf. *Flint*, "The Philosophy of History in France and Germany," Cap. IV; *Janet*, "Histoire de la science politique," Vol. II, p. 671 et seq. It is worth noting that Turgot anticipated many of Comte's principal doctrines, including that of "the three states."

des progrès de l'esprit humain." [28] Kant's treatise, "Ideen zu einer allgemeinen Geschichte in weltbürgerlicher Absicht," [29] is of similar import, but far more profound, and animated by a more precise philosophical purpose. Kant's philosophical principles enabled him to distinguish accurately between the metempirical or noumenic and the empirical or phenomenal phases of human acts. From the first point of view, acts are but extrinsifications of human liberty; from the second, they are subject to the laws of nature, which govern all phenomena. History studies human acts from the second point of view; it should, therefore, lay bare their causes, wherever found, and show the regularity of their processes. Thus, facts considered individually may seem to be produced confusedly and irregularly, but, when considered in the sum of the species, they can be recognized as a continual though slow development from their original manifestation. The development of the tendencies of human nature should necessarily lead to the full use of reason and, therefore, to the establishment of a universal civil society, where justice would reign and the liberty of each individual would harmonize with that of all others. The history of mankind can, in this sense, be regarded as the fulfillment of a secret

[28] See *Comte's* criticism of this book, "Cours de philosophie positive," Vol. IV, p. 252 et seq. Cf. "Système de politique positive," Vol. IV, App., p. 109 et seq.; *Flint*, "The Philosophy of History in France and Germany" p. 74 et seq., 95 et seq.; *Janet*, "Histoire de la science politique," Vol. II, p. 682 et seq.

[29] Other writings of *Kant* in point are: "Vom Verhältniss der Theorie zur Praxis im Völkerrecht," composing part three of "Ueber den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis," and "Der Streit der Facultäten," Zw. Abschn. ("Der Streit der philosophischen Facultät mit der Juristischen. Ob das menschliche Geschlecht im beständigen Fortschreiten zum Besseren sey?")

design of nature to produce a perfect political constitution.[30] This idea of a goal for world history has an essentially speculative value in Kant's mind, serving as a link to systematize human acts, which otherwise would constitute an unformed mass. Kant declared explicitly, however, that this cosmopolitic view of history, conceiving of it as "a priori" to a certain degree, does not prevent empirical research.[31] Theoretically, therefore, the idea of universal progress is a necessary hypothesis, confirmed by experience; practically it is a postulate of our moral consciousness. The belief that only the individual can perfect himself and grow better, while the human race, oscillating between progress and regress, always keeps about the same degree of morality and happiness, contradicts the imperious demands of practical reason. Kant wrote one of his books[32] expressly to overcome this belief, which Mendelssohn held in his day. The hope that individual acts tend to the betterment of humanity is a necessary concomitant of a similar duty. For this reason, Kant states that faith in human progress is not merely a speculative principle formed to grasp historical movement in its generality, but an irrefutable corollary of moral law.

§ 36. *Juridical Development Objectively Treated.* The lofty doctrine of Kant (as to the truth of which we shall have furthur occasion to adduce proof) represents the final rationalistic form of the concept of historical movement. But, for divers reasons, by the year 1800 and

[30] "One can look upon the history of the human species as the completion of a hidden plan of nature to actualize an internally and externally complete State, or as a unit in which it can develop all the phases of the life of man." "Ideen zu einer allgemeinen Geschichte," 8 Satz.

[31] "Ideen zu einer allgemeinen Geschichte," 9 Satz, *in fine.*

[32] "Vom Verhältniss der Theorie zur Praxis," p. 75, n. 2.

more markedly since, a decided change in the consideration of social facts in general, and of law in particular, took place. An objective and phenomenalistic point of view was substituted for the old subjective and rationalistic standpoint, so that the philosophical development of law was forgotten. Law was considered merely in its phenomenological and empirical aspect. This change of method was more marked and more rapid in law than elsewhere, because, apart from general causes, which brought about a similar change in all mental sciences, there were immediate motives for reaction against the legal theories of the past. Before juridical and political criticism had commenced its philosophical work, opposition to the rationalistic doctrine of law and State had been aroused and sustained for political reasons. The French Revolution, begun under the flag of the old doctrine and ending in riot and anarchy, seemed a proof of its fallacy and resulted in the association of natural law with revolution. A bitter struggle was begun against revolutionary metaphysics (as it was then called) by those who had to fear the direct or indirect effects of the Revolution or its possible successors. Such a reactionary movement, drawing allegiance away from abstract juridical speculation, had to depend upon the advances of the studies of historical reality of the preceding period, while applying them in a very different philosophical spirit. And thus juridical and political sciences were governed before the others by a cult of tradition and fact in place of one of reason, by objectivism in place of subjectivism, and by empirical "a posteriori" analysis in place of ideal "a priori" deduction. The "historische Juristenschule," then formed, was the expression of this great tendency. And as the theory of progress, corresponding to a rationalistic conception of law, was eminently liberal in its principles,

so the new historical doctrine, arising from a foundation of empiricism, through the impulse of political reaction, was essentially conservative and anti-liberal.[33]

§ 37. *Juridical Views of the Historical School.* Yet it is true that the theory of the new school included a speculative element in the historical consideration of law. It originated in Schelling's transcendental philosophy (then, also, in Hegel's), which, recognizing the organic aspect of popular formations of culture, referred it to the evolutive and creative activity of the universal spirit or soul of the world. Comte saw the double nature — metaphysical and positive — of the historical school of law.[34] But this speculative element,

[33] See, on this point, *Del Vecchio*, "La Dichiarazione dei diritti dell' uomo e del cittadino nella rivoluzione francese" (Genoa, 1903), Cap. IV and cf. *Brugi*, "Di un recente libro sulla Dichiarazione dei diritti dell' uomo e del cittadino del 1789" (Padua, 1903), in "Atti e memorie della R. Accademia di scienze, lettere ed arti in Padova."

[34] See *Comte*, "Cours de philosophie positive," Vol. IV, p. 284. Comte valued the school of German jurists as evidencing a new positivistic beginning in social and historical studies, since it had "taken for its principal task to connect, in each epoch of the past, the sum of legislation with the corresponding state of society." But he also noticed "the tendency to fatalism or optimism . . . resulting from the necessarily incomplete and even ambiguous nature of these interesting works, still essentially dominated by a metaphysical philosophy." *Vanni* attempted to confute this criticism, stating that "there are all the earmarks and spirit of positive research" in the doctrines of the positive school. "I giuristi della scuola storica di Germania nella storia della Sociologia e della Filosofia positiva" (Milan, 1885), in "Rivista di Filosofia scientifica," p. 13. Cf. "Il problema della Filosofia del diritto," p. 12. It cannot be denied, however, that the "historische Schule" admits a dogmatic and transcendental element in its principles, which fact is worthy of particular note inasmuch as originally this school did not pretend to constitute "per se" a full philosophy of law. *Gierke*, "Naturrecht und deutsches Recht," p. 7. "The historical school has not even understood the question which the philosophy of law solves. It

which resolved itself in the logical proof of growth and above all of the grown, remained practically barren. In fact, the scientific program of the school is openly explained as the application of the test of phenomenal relativity to the study of law. This criterion, of the dependence of juridical reality upon accidentals and its connection with society in general, was necessarily neglected or considered secondary and subordinate until law was treated less as a phenomenon than as an idea. The knowledge of the connection of law with historical conditions had, of course, increased in the course of time, as we have said, but no school had used this knowledge as grounds for a radical change in the philosophical doctrines of law. Many had come to look upon its natural variety as a problem wherein it was necessary to reconcile this variety somehow with a traditional principle of original unity. No school, however (if we except the sceptics), admitted that this variety contained in itself a negative solution of the problem, or that it was incompatible with the idea of absolute law, and was,

has looked upon it as of no importance or has passed it by." Cf. *Stahl*, "Die Philosophie des Rechts," 5 ed. (Freiburg, 1878), I Bd.; "Geschichte der Rechtsphilosophie," p. 584 et seq. Such was the meaning which the historical doctrine took on later and the interpretation given it under the influence of predominant empiricism. (Cf. § 72, post.) We must not forget that recently there has been a general effort to give the theories of the historical school a philosophical meaning, by citing Hegel and Vico. Cf. *Lasson*, "System der Rechtsphilosophie"; *Cavagnari*, "Saggio di Filosofia giuridica," esp. Caps. VIII–X; "Corso moderno di Filosofia del diritto," Vol. I, esp. p. 414 et seq. For the philosophical meaning of the historical school, see also *Brugi*, "I Romanisti della scuola storica e la Sociologia contemporanea" in "Circolo giuridico," XIV, 1883, p. 151 et seq.; "Introduzione enciclopedica alle scienze giuridiche e sociali nella sistema della giurisprudenza," 4th ed. (Milan, 1907), pp. 36–65; "I Romanisti della scuola storica e la Sociologia contemporanea" in "Riv. ital. di Soc.," VI, 1902, p. 228 et seq.

therefore, ready to exclude it. The theoretical reversion of the historical school (continued by the positivistic schools) had this significance: the methodical supplanting by genetic and relative criteria of all other tests which had hitherto been thought predominant and "a priori" in respect to law. Relativity and variability of law were not, for the historical school, one of the terms of an antithesis which could be overcome by a higher synthesis; they did not represent a secondary aspect or a fleeting image — as it were — of the true object. They were thought to contain the ultimate and invincible truth, the most general principle of the scientific explanation of law. Disregarding the maxim that a philosopher sees the problem begin at the point where it ends for others, the historical school accepted as the solution what was, for others, a question difficult of solution and a motive for speculation. It is true that a rigid and profound knowledge of the principle of relativity induced this school to accept it as their highest canon. The mark of distinction between the work of this school and earlier attempts of a similar kind (with the simple exception of Vico's) lies in the abandonment of the extrinsic for the intrinsic conditions of positive law. This it shows by recognizing that law is not in so close a relation with climate and physical conditions of time and place as with the psychical state of the people, whose conditions it reflects. It places the original and enduring source of law in popular consciousness, and shows how law necessarily encounters and fuses with all other elements of culture in it.[35] We do not wish to enter here upon a

[35] "These phenomena, — law, language, customs, government — have no separate existence, there is but one force and power in a people, bound together by its nature; and only our minds give them separate existences. What makes it a single whole is the common conviction of the people, the like feeling of inner necessity, to which

discussion of this, nor of any doctrine of the "historische Schule" at this point;[36] but in connection with our subject we must point out that it gave a strong impulse to the study of the phenomenal reality of law. Though the negative philosophical conclusions arising from its methods (for sometimes historicism, as Gabba points out,[37] is but "a sceptic school more or less disguised under a new name") must be disproven (as we will do in a logical place),[38] one claim of merit cannot be denied it — that in its work it showed more effectually than was ever shown before the need of studying law in relation with other forms of social life. The penetration into the common scientific base of the principle that law is an integral part of the life of a people, indissolubly interpenetrant with all elements of its activity and culture, and of necessity, therefore, transfusing with them,[39]

all attribute a contingent and arbitrary origin." These words by *Savigny*, in "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" (1814; 3 ed., Heidelberg, 1840, p. 8), contain the fundamental thought of all the historical school.

[36] Del Vecchio touched upon the principal faults of this school in "Il sentimento giuridico," and deals with them again in Cap. X, p. 85, post. Cf., for a criticism of this school from another point of view, *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," p. 480 et seq.

[37] "Alcuni più generali problemi," I Serie, p. 21.

[38] See Cap. X, p. 85, post.

[39] *Savigny* wrote a clear exposition of the inevitable and constant evolution of law in connection with the successive moments in the life of every people. "This organic involution of law with the life and character of people develops with the ages, and in this it resembles language. As in the latter, so in law, there can be no instant of rest, there is always movement and development. For all the progress of mankind including the development of law is governed by the same power of internal necessity as simple phenomena. Law grows with a nation, increases with it and dies at its dissolution, and is a characteristic of it." "Vom Beruf unserer

is above all due to this school. It laid the foundation for a scientific explanation of the fact of the variety in law, although it did not correctly analyze it. The analytical studies and arguments of the philosophy of history from the year 1800 until to-day, far from destroying, have constantly confirmed this principle, reinforcing and illustrating it in different ways. Hegelian philosophy (whose relations with the theories of the historical school we have mentioned) has, in general, given an objective tendency to the moral sciences differing and in fact exaggerating the cult of fact and historical growth in its dogmatic pantheism, which is substantially an "a priori" realism.[40]

§ 38. *Sociology. Comte.* The positivism of Comte is founded entirely upon the idea of the necessary correlation of every kind of phenomena. And from the necessity of considering human facts as governed by laws analogous to those governing all other phenomena, there grew in Comte's mind the concept of a new science or general doctrine of society — Sociology.[41] In this

Zeit," p. 11. For the contradiction between this and the other doctrine of the same school, that Roman law should be accepted by modern nations as normal law, see *Ahrens*, "Naturrecht oder die Philosophie des Rechts," 6 ed. (Vienna, 1870–71), I Bd., p. 172 et seq. *Arnold*, in "Cultur und Rechtsleben," clearly outlines the organic connection between law and the other multiplicate forms of culture according to the principles of the historical school. The school of Krause developed this concept.

[40] For this realistic fundamental significance of Hegelian doctrine, cf. *Gabba*, "Alcuni più generali problemi," I, p. 20; *Petrone*, "La fase recentissima della Filosofia del diritto in Germania," p. 12 et seq., p. 92 et seq.

[41] See esp. "Cours de philosophie positive," Lecture 48; "Caractères fondamentaux de la méthode positive dans l'étude rationelle des phénomènes sociaux," Vol. IV, pp. 287–470. From the idea of a consensus or "fundamental solidarity between all divers social aspects," Comte deduced the necessity of studying social reality as

regard we can say that no reform of method, no matter how stringent, suffices to effect a new science. For this a specific object and content is necessary, to distinguish it from all other pre-existing sciences. Now the study — even the synthetic study — of human facts is as old as human thought; it was not introduced "ex novo" by sociology. The only distinctive mark of sociology is its objective treatment of human facts as phenomena naturally determined and connected in their development.

§ 39. *Sociology. Spencer.* The question of the possibility and object of sociology now in controversy exceeds the proper limits of our subject and cannot be treated as incidental to it. We will here also disregard the philosophical meaning, which is generally attributed to the historical and genetic study of social facts, postponing it to a later chapter.[42] In this place we will merely grant what, in fact, all modern sciences have demonstrated, namely, that there are infrangible bonds between legal institutions and the conditions of existence, which are realized and understood more or less consciously by every people, or its major part, in every moment of its life. With a variation in these

a single unit both in static and dynamic regards: "Since social phenomena are so deeply connected, their real study can never rationally be separated; whence arises a permanent necessity, as unavoidable as direct, of always considering diverse social aspects simultaneously, whether social statics or dynamics are under consideration" (p. 352). "The true general spirit of dynamic sociology consists in conceiving of each consecutive social state as the necessary result of the precedent and the indispensable cause of the subsequent state. Its object, therefore, in this regard, consists in the discovery of constant laws governing this continuity, whose sum determines the fundamental advance of human development" (pp. 365–66).

[42] Cf., esp., Cap. X, p. 85, post.

conditions and with divers phases of general social development, a corresponding change in law must be effected. This concept of the inevitable historical relativity of law is confirmed by modern biologists. Darwin, who received inspiration for his biological discoveries from Malthus' treatise on population, showed how such discoveries in their turn explained certain developments of social life. But Spencer deserves the credit of clearly formulating the connection between the two kinds of research, transposing the criteria of the conditions of existence and the laws of adaptation to environment, and those of evolution from the field of organic to that of superorganic or social facts. Historical movement came, therefore, to be understood and explained in a new light, as the progressive adaptation of human society to environment. The connection of rules of conduct with objective conditions of existence was also recognized in a dynamic sense, making the development of social life appear as a necessary and coherent development of cosmic evolution; whence, a long series of discoveries in the analysis of the social function of law and the factors determining its evolution according to these new criteria.

§ 40. *Comparative Law.* The historical analysis of law was accompanied by a great extension in research, of which it was both the cause and effect. Different times and nations were studied, which up to that time had escaped examination because they were thought unworthy of it.[43] The comparison of the legal institutions

[43] The historical school of law was not free from this prejudice, for in its worship of Roman law it severely restricted its scope and failed to grasp the importance of ethnographical comparison. On the contrary, *Thibaut* wrote, "Our history of law, to be truly pragmatical, must include the legislation both of ancient and modern countries. Ten good lectures on the jurisprudence of the Persians

of various peoples grew so rapidly that juridical ethnology is now considered a distinct science. Its vast design is far from being fully realized, but still it is undeniable that the comparative study of the various races, especially in their first stages of juridical development, has thrown no little light upon the genesis and later development of law. The analogous progress in the sciences of social facts has contributed also to the advance of historical knowledge of law. Comparative philology greatly helped discoveries of prehistoric juridical facts (especially in the splendid work done by Leist). Even more important, in its consideration of the intrinsic coefficients of law, was the aid of the economic studies, which, in giving rise to the discussion of method, bore rich fruit. The conflux of these various currents necessarily resulted in partial contradiction, since the different starting-points were necessarily reflected in the final conclusions reached concerning the same object. It is not surprising that those who, following Darwin and Spencer, took a biological point of view of human society gave its organic conception an exclusive and perhaps erroneous meaning. This also explains, if it does not justify, the excessive predominance given by the economic school to the economic element in the determination of social structures.

and Chinese would awaken more true juridical thought than a hundred on some wretched technical point, such as the basis of the Laws of Decedent's Estates from Augustus to Justinian." ("Civilistische Abhandlungen," 1814, p. 433.) Even more recently, while admitting the value of comparative jurisprudence, some authors wanted to restrict it to civilized people. Thus, for example, *Walter*, "It is well worth while to compare the existing laws only of civilized nations." "Naturrecht und Politik im Lichte der Gegenwart," 2 ed. (Bonn, 1871), § 19. In these latter days with the study of the "Naturvölker," the other extreme has been reached, which is criticized by *Lasson*, "System der Rechtsphilosophie," Pref., p. x; and *Vanni*, "Lo studio comparativo delle razze inferiori nella Sociologia contemporanea" (Perugia, 1884).

§ 41. *Relativity of Law. Conclusion.* But these partial divergencies do not prevent the modern studies of society and law from leading to a common end, which contains their general results and supplies the fundamental methodical canons to be applied in their pursuit. They are (to epitomize the general principles whose doctrinal genesis we have outlined) first of all, the concept of the interpenetration of all social facts, so that it is impossible, for example, to study the law of a given people in a given time apart from all the other subjective and objective conditions of its life. Then comes the concept of the natural determination of social facts, so that the appearance and duration of an institution are explained in relation not so much to its ideal and abstract rationality as to the actual presence of vital forces capable of forming and maintaining it (we may call it the principle of sufficient historical reason). And lastly, there is the concept of development or growth (to which everything in life is subject), which proves that law has a life and must transform in time with the modifications of the conditions of existence, with which it is connected. The true constancy of the historical changes of law is found in its relation to the other elements of social life. "The positive law of a people at a definite time is always the inevitable product of the history of its ethnico-morphological constitution and the life-conditions under which it is formed." [44] This passage by Post can be accepted as the epitome of the modern historical conception of law, which admits the natural relativity and instrumentality of law itself.[45] However grave and

[44] *Post*, "Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis," I Bd. (Oldenburg, 1880), p. 71.

[45] "If law," writes *Post*, "is a result of the actual collective life of an ethnico-morphological construction, and we see such in progressive development, it goes without saying that the content of law must be a continually changing one. In fact, according to the type of

prejudicial to an abstract determination of the concept of law such an admission may seem, it is none the less inevitable if one professes an unconditional respect for the reality of facts, whatever may be their significance and consequences. Only on this condition an idealistic philosophy, which does not recognize that facts mark the *limit* of the human mind, can trust itself to a firm foundation, without laying itself open to the old criticisms, wherein lies the greatest strength of empiricism in general and of positivism in particular. The historical relativity of law must be, and is to-day, admitted by all who have grasped the meaning of scientific objectivity.[46] Considering this principle as accepted, therefore, we will proceed to its consequence in relation to our theme.

ethnico-morphological organization, in which the law arises, and the conditions of existence under which it develops, the law must be somewhat different at all times and among all peoples, and, too, it must be recognized as law" ("Bausteine," 1 Bd., p. 60). *Bruns* has given typical and comprehensive formulæ on this subject: "The different national laws, which govern single nations, are not absolute but single changing phenomenon in the great current of history, and, in general, therefore, where an historical development of national life takes place, law must be included as an actual part of its conditions. As every nation, so must every age have its own distinct law. The changes which enter into the social and spiritual life of a nation must effect alterations and improvements in its laws." "Geschichte und Quellen des römischen Rechts," § 1. To the same effect, see inter alios, *Lor. v. Stein*, "Gegenwart und Zukunft der Rechts- und Staatswissenschaft Deutschlands" (Stuttgart, 1876), pp. 97, 135 et seq.; *Ihering*, "Der Zweck im Recht," I Bd., 3 ed. (Leipsic, 1893), p. 435 et seq.

[46] "When the conditions of the life of a people change and its needs are altered," writes one of the masters of the spiritualistic modern philosophy of law, "their positive law is modified and transformed. The different grades of people's culture have different ways of determining what is just; such determination is realized in positive law." *Filomusi-Guelfi*, "Enciclopedia giuridica," p. 47; cf. his "La codificazione civile e le idee moderne che ad essa si riferiscono" (Rome, 1887), p. 13 et seq.

# CHAPTER VII

## CONSEQUENCES AND LIMITS OF THE RELATIVITY OF LAW

RECOGNITION OF HISTORICAL VARIETY AND APPARENT IMPOSSIBILITY OF AN UNVARYING DETERMINATION OF LAW. — EXCESSIVE RELATIVISM AND REALISTIC CONFORMITY IN INSTITUTIONS. — PROGRESSIVE UNIFICATION OF LAW. — VALUE OF THIS PRINCIPLE "PER SE" AND IN THE PRESENT STUDY.

§ 42. *Modern Denial of Law as a Unit Fact.* The conclusion, which at first seems inevitable from the facts established up to this point, is that a universal objective definition of the concept of law is impossible. If law is not a quiescent reality, but constantly changes with the mutable conditions of life and culture, how can we hope to confine it in a universally acceptable definition? History properly contains not law but as many laws as there are social conditions. The criterion of justice is not fixed and immutable, on which, as by categorical necessity, without distinction of time or place, equal institutions and decrees can be uniformly based, but assumes many shapes, varying with the determining conditions. The logical definition of an object presupposes it a unit, — that it is always equivalent to itself. Now the only constant factor to be found in the historical life of law is that it is not an entity but a relation, as we have shown. Not law "in se" but only its relation to its real bases can be said to be immutable and absolute.[1] The historical variety of law, which

[1] Cf. *Vanni*, "Filosofia del diritto," p. 61.

was primarily considered as a simple fact controlled by law, has, thanks to scientific progress (as outlined in our last chapter), assumed the true and proper significance of a law itself. It no longer represents a mere "datum" of experience, but rational necessity or will. So, by a cruel irony of thought, the long-sought unity dissolves in the act of grasping it; the criterion which comprehends and dominates the whole juridical reality seems to result in the impossibility of uniform conception. If we regard the character of modern speculation about law, we find that it does not tend so much to the discovery of its substance as to the narration of its history and the description of its function. Giving up all attempt to discover an objective essence in law, the philosophy of to-day defines it almost exclusively as a term of a relation and a means for the attainment of certain ends (such as social protection, preservation, development). This is one of the causes of the characteristic vagueness of recent fundamental notions of law. It is true that this seems the inevitable corollary of the propositions already proven, which show the need of an historical view of law. Once recognizing the infinite and necessary diversity of the historical configurations of law, how can we escape the conclusion which Post, for example, has drawn, that "a constant idea of law is nonsense"?[3]

§ 43. *Modern Denial of Law as a Unit Fact is the Result of Anti-idealistic Views.* There is no doubt that this conclusion is favored implicitly or explicitly by the anti-idealistic trend which prevails to-day. The denial of a universal and objective idea of law is in fact only an example of the present denial of all ideology. Comte found a metaphysical residuum in the idea of law, which made him as suspicious of it as he was of the causal

[3] *Post*, "Bausteine," I Bd., p. 60.

idea in other fields. And, as Comte's aversion to metaphysical ideas is the part of his thought most propagated and encouraged by modern schools, we cannot marvel that the idea of law, with its traditional characteristics of absoluteness and universality, has been attacked and made the object of all the objections which are directed against the metaphysics of the past in general, until the idea, which Plato considered the sun of the spiritual universe, has come to be considered in our day as the stronghold of mental prejudice and superstition. This excess of anti-philosophical reaction is undoubtedly the reason why, in the fury of destroying the ideological postulates of the older doctrines, their proofs resulting from the objective studies of facts are forgotten. We have already pointed out[3] the number of cases common to the laws of various peoples, through which the older school profited by intuition. The modern studies, by whose light the variety in the forms of life and the difference according to time and place of both men and nations are more clearly seen, have shown with equal clearness that there are deep-rooted similitudes and continuous analogies, and even true and actual equalities of principle and institutions, among various peoples in different ages. We can proclaim with certainty that what Cicero called the "insignis humani generis similitudo"[4] is always clearly shown by the customs and laws of all races. Now, after the latter-day studies, based on biological ideas of conduct, there is less justification than ever for holding that life has not fixed conditions determined by its essential functions, which necessarily result in uniform elements of activity and thought in every individual and society.[5]

[3] Cf. Cap. IV, p. 14, ante.

[4] "De Leg.," Lib. I, par. 11.

[5] The testimony of *Post* on this point, founded on his vast investigations in ethnographical jurisprudence, is invaluable. He states

§ 44. *Proof of Law as a Unit Fact.* This uniform substratum, which Vico called "the common mind of the nations," is, "per se," sufficient to stay the course of scepticism,[6] the goal of those who, erroneously dogmatizing the proper principles of the historical method and erring in their application, feel bound to find nothing in phenomena but a constant inconsequent flow.[7] It is the common substratum which gives scientific meaning to comparative study. In other words, it renders the product of their respective data scientifically legitimate and conclusive. It is not mere chance which leads the greatest masters of comparative jurisprudence to point out with special care the common bases found in the laws of various peoples. Only from this community of base can we undertake the highest object of this science, that is, the co-ordination of all the juridical formations in a system, so that they can be considered as phases of a universal and substantially homogeneous historical movement.[8] From

"that there are a number of similar legal customs among different peoples and in different ages, which are based on similar human nature and on similar conditions of existence." "Bausteine," Bd. I, p. 54, and cf. p. 14 et passim.

[6] With this point of view, *Rousseau* confuted Montaigne, "Émile," Lib. IV, p. 340 See also, for many true observations on this subject, *Janet*, "L'unite morale de l'espèce humaine," in "Revue des deux mondes," Vol. LXXVII, 1868, pp. 892–931. Cf. *Schiattarella*, "L'idea del diritto nell' Antropologia, nella Storia e nella Filosofia" (Florence, 1880), I. Also, *Tissot*, in his "Introduction historique à l'étude du droit" (Paris, 1875), proposes to show the fundamental unity of human nature throughout the variety of juridical history.

[7] Against the concept of absolute mutability, which is incompatible with science, see *Spir*, "Recht und Unrecht," 2 ed. (Leipsic, 1883), Cap. I.

[8] This special character distinguishes the ethnographico-comparative method from the historical in a strict sense. Cf. *Post*, "Einleitung in das Studium der ethnologischen Jurisprudenz"

the synthetic consideration of the history of law we can make an induction of the greatest importance, which increases the value of the particular similarities (which we have shown analytically); this is the induction of the progressive unification of law, shown in the tendency among all peoples to co-ordinate their laws and institutions. The causes of this important fact are manifold, because of its relation to many phenomena. In its most profound significance, it is referable to the intrinsic development of human knowledge, which is always tending towards the universal, and the recognition of the equality of man.[9] In its external and concrete

(Oldenburg, 1886): "Ueber die Aufgaben einer allgemeinen Rechtswissenschaft" (Oldenburg, 1891); "Grundriss der ethnologischen Jurisprudenz" (Oldenburg, 1894–95); and his other works cited hitherto; *Bernhöft*, "Ueber Zweck und Mittel der Vergleichenden Rechtswissenschaft" in "Zeitschrift für Vergleichende Rechtswissenschaft," I Bd. (Stuttgart, 1878), pp. 1–38; *Hildenbrand*, "Ueber das Problem einer allgemeinen Entwicklungsgeschichte der Rechts und der Sitte" (Graz, 1894); *Kohler*, "Ueber die Methode der Rechtsvergleichung" in "Zeitschrift für das Privat- und öffentliche Recht der Gegenwart," Bd. XXVIII, 1901, pp. 273–84; "Rechtsphilosophie und Universalrechtsgeschichte," "Die Rechtsphilosophie der XX Jahrhunderts" in "Deutsche Juristen-Zeitung," IX, 1904, pp. 27–34; *Del Vecchio*, "Sull' idea di una scienza del diritto universale comparato," 2nd ed. (Turin, 1909; Germ. transl., "Die Idee einer vergleichenden universalen Rechtswissenschaft," in "Archiv für Rechts- und Wirtschaftsphilosophie," Bd. VII, pp. 2–3, Berlin, 1914).

[9] This clarifying principle is not, as some believe, a mere ethical demand or metaphysical postulate; it has been constantly proved by examination of the historical development of law, which has shown that personal protection, originally reserved to members of a certain ethical or tribal group, and denied to foreigners, has been gradually extended to a larger circle, until for certain purposes it includes all mankind. Vide *Petrone*, "La Filosofia del diritto al lume dell' idealismo critico," p. 439 et seq., where the testimony of Darwin on this point is collected. See also, *Tarde*, "Les transformations du droit," 2d ed. (Paris, 1894), p. 59 et seq.; *Catellani*, "La dottrina platonica delle idee e il concetto di società internazionale"

relations, it is the effect of the necessity which forces groups of men, as they modify their conditions of life in order to escape from their primitive isolation, to contract new and more active reciprocal relations. These complex relations, which comprehend the exchange of things (commerce) as well as of ideas, naturally lead to the formation and progressive development of international law, which in turn exercises a strong influence on the development of national law.

§ 45. *Co-ordination of Laws.* The consequence is that the general and constant elements of law tend to prevail over the particular and occasional. The substitution of human for national concepts (upon which ancient law was moulded) is one of the essential signs of civilization. "The national character" of law, the slogan of the historical school,[10] is a sign of incomplete development. It predominates in the first stages of juridical evolution, but loses its importance as the latter advances. And if it does not become valueless it is so modified as to allow of the formation over and above all particular national laws of a vaster complex unity or superior ethico-juridical organism, founded on universal conditions of human existence.[11] The uniformity of the

(Turin, 1898), in "Studii giuridici dedicati a F. Schupfer." Cf. *Del Vecchio*, "L'evoluzione dell' ospitalità" in "Riv. ital. di Soc.," VI, 1902, Fasc. II–III.

[10] Cf. on this point, *Stahl*, "Die Philosophie des Rechts," Bd. II, Lib. II, Cap. IV.

[11] This concept, of which traces can be found in Stoicism, was clearly outlined by Kant, and empirical researches have only confirmed it. So the idea of human progress, against whose dogmatic aspect a reaction only partly justified had taken place, as we have said (cf. § 15, ante), is again accepted, though in a more strictly scientific guise. We now generally admit that the state of perfect harmony, which ancient philosophy supposed to have existed in primordial days, is on the other hand the end to which humanity tends by infinite paths.

laws of various peoples is not, therefore, merely static, but what is more important, dynamic and progressive

The doctrine of a cosmopolitan law ("jus cosmopoliticum," "Weltbürgerrecht") as the necessary goal of the course of mankind was held by Kant, besides in the writings cited ante, in "Met. Anfgangs. d. Rechtslehre," Zw. Th., Dritt. Abschn., and "Zum ewigen Frieden." This doctrine, which *Schelling* also supports in "System des transcendentalen Idealismus," p. 586 et seq., 591 et seq., is followed by *Hegel*, notwithstanding the different character of his system, as far as his conception of the State as an entity will permit. Vide "Grundlinien der Philosophie des Rechts," §§ 330–360; "Encyclopädie der Philosophischen Wissenschaften," §§ 548–552; "Philosophie der Geschichte" at the end. Hegel states that the history of the world is the development of the idea of freedom, and places the authority of the universal spirit over the laws of separate States. This authority is shown in history, which constitutes, according to a known formula, the tribunal of the world. But Hegel does not admit a true law in the relations between States. Vide, on this point, *Lasson*, "Prinzip und Zukunft des Völkerrechts" (Berlin, 1871); "System der Rechtsphilosophie," §§ 36, 37. *Filomusi-Guelfi* thought it possible to make a full juridical co-ordination, within the confines of the Hegelian theory, that is, an all-powerful association of nations which would not lose their distinct individuality by entering it. Vide "Enciclopedia giuridica," p. 705 et seq.; cf. p. 51 et seq., p. 676 et seq. In confirmation of this we may recall that *Bluntschli*, inspired, as is well-known, by Hegelian thought, held that humanity tended to the formation of one State, in which alone the State-idea would be fully realized. This is, in substance, the thought of Kant. See "Lehre vom modernen Staat," Erst. Th., "Allgemeine Staatslehre," 6 ed. (durchges. von Loeming, Stuttgart, 1886), Lib. I, Cap. II; "Die Bedeutung und die Fortschritte des modernen Völkerrechts" (Berlin, 1866), p. 63 et seq. Cf., also, *Trendelenburg*, "Naturrecht auf dem Grunde der Ethik," 2 ed. (Leipsic, 1868), §§ 218, 235; *Miraglia*, "I principii fondamentali dei diversi sistemi di Filosofia del diritto e la dottrina etico-giuridica di G. W. F. Hegel" (Naples, 1873), p. 201 et seq.

Among the modern positivistic doctrines which can be adduced to prove the progressive ethico-juridical co-ordination of mankind, that of Spencer deserves particular notice. After showing that historical progress represents "the progressive adaptation of humanity to the social state," Spencer takes up the condition of "perfect

as well. The idea of the just tends to fix its content, assuming always a meaning more purely and universally human. Here, too, historical reality endeavors to harmonize with reason; facts approach little by little what is revealed in the consciousness as an immediate need.

§ 46. *The Unity of Law not Provable by its Content.* If we could not oppose anything but similarities in the

adaptation," and deduces therefrom a code which he calls "absolute ethics," which "formulates the method of life of a man fully adapted in a fully developed society." "The Data of Ethics," § 106. Absolute ethics prevail more and more over relative or provisional ethics as the gradual process of adaptation is fulfilled. Ethico-juridical ideas and sentiments, at first varying, become "uniform and permanent, because the conditions necessary to complete social life are uniform and permanent." "The Principles of Psychology," § 524. This doctrine has much truth in it, but lacks precision and corresponds badly to the premises of the Spencerian philosophical system. Cf. *Vanni*, "Sist. di Spencer"; *Anzilotti*, "La scuola del diritto naturale"; *G. Vidari*, "Rosmini e Spencer" (Milan, 1899), Pt. II, Sec. II; *Juvalta*, "La dottrina delle due Etiche di H. Spencer" in "Rivista filosofica," Anno VI, Vol. VII, 1904. Cf. also *Del Vecchio's* note in the "Riv. ital. di Soc.," Anno VI, 1902, p. 666–673.

The progressive diminution of national and particular elements in the juridical institutions of various nations, giving place to a larger historical fact, was admitted by *Vanni*, "Prime linee di un programma critica di Sociologia," p. 66. "Sist. di Spencer," p. xxi, "Lezioni" p. 237. Cf., on the analogies in the law of advanced nations, *Austin*, "Lectures on Jurisprudence, or the Philosophy of Positive Law," 5 ed., revised by Campbell (London, 1885), p. 1077, et passim. *Carle*, who, in his "Genesi e sviluppo delle varie forme di convivenza civile e politica" (Turin, 1878), had laid stress on the gradual increase in human groups, by which "humanity was always growing" in the forms of law (p. 37), states later "that a system of law is to-day forming before our eyes, like the extension of the ancient tribal law under the hands of the Romans." "La Filosofia del diritto," p. 239, n. 2; cf. p. 381 et seq.; cf., too, *Leist*, "Ueber die Entwicklung eines positiven gemeinen Rechts in der civilisirten Menschheit" (Basel, 1846); "Die realen Grundlagen und die Stoffe des Rechts" (Jena, 1877), p. 172 et seq.; *Zitelmann*, "Die Möglichkeit eines Weltrechts" in "Allgemeine österreichische Gerichts-

content of law to the negative arguments of empiricists, the possibility of a universal definition of the concept would be far from assured; for, by the side of these similarities and identities, inequalities and contradictions are found in its historical manifestations. Nor would the fact that the latter are disappearing, making way for a more perfect uniformity, justify their elimination from scientific examination, for all existing facts, however transitory and of whatever value in respect to a criterion of another order, must be equally considered and included in any definition which hopes to be truly objective and universal. Let us repeat here what we have already said on the subject of natural law:[12] the idea of natural law is in fact connected with that of a "human world-wide law," which can be described in terms of historical evolution. We admit the value of such ideas and believe them well-founded in their proper sphere, but we must distinguish diverse scientific demands. We are now seeking a type, a paradigm in the Platonic sense, a supreme criterion to weigh diverse positive laws. We do not want to determine the last stage of its evolution, but to find the omni-comprehensive idea which includes in itself all facts, showing its common essence. If such an essence exists, it cannot be founded on coincidences and similarities, which, however extensive, represent only one part of the reality of law or only one phase (even if it is the highest and most perfect) of its course, but must be referable to something fixed, constant and universal. We have noted the gravest

zeitung" (Vienna, 1888), Th. 25–27; *Ludwig Stein*, "Die soziale Frage im Lichte der Philosophie," 2 ed. (Stuttgart, 1903), p. 124 et seq.; *Del Vecchio*, "Il fenomeno della guerra e l'idea della pace," 2nd ed. (Turin, 1911; German Transl., "Die Tatsache des Krieges und der Friedensgedanke," Leipsic, 1913).

[12] Cf. Cap. III, p. 14, ante.

doubts (caused by a perception of the historical nature of law) of the possibility of such a definition. If the latter is by its nature conditional and relative, how can a fixed and universally true definition of it be given? How can a necessarily common element be found in what is of necessity varied? The answer to these questions must show the impossibility of definition, unless — and this is a point of capital importance for our theme — all the proofs of the historical relativity of law obtained by an examination of facts concern only its content, and have to do only with the internal changes and concrete implications of various judicial propositions. It is clear that the only statement that can be properly predicated upon historical facts is that the logical definition of law cannot be gotten from the content of juridical experience. Thus far we agree perfectly with Post.[13] Now, what if the essence of law is entirely reducible to its content, that is, to the material of separate juridical propositions? And, if this material is bound "de facto" to the multiplicate tides of history and alters with them, will it be possible to find elsewhere an "ubi consistam" for determining the immutable essence of law? This we must determine in the following chapters.

[13] "It can be seen from these examples . . . that the content of distinct statutes is not that from which the nature of law can be ascertained." "Der Ursprung des Rechts," p. 18.

# CHAPTER VIII

## FORM AND CONTENT OF LAW: THE POSITION OF THE PROBLEM IN THE THEORY OF KNOWLEDGE

LOGICAL UNITY AND ACTUAL MULTIPLICITY. — THE LOGICAL UNIVERSAL AS FORM. — THE PROBLEM OF KNOWLEDGE IN ITS FUNDAMENTAL RELATIONS. — CRITICISM AND POSITIVISM. — METAPHYSICAL CHARACTER OF IDEAS. — FUNDAMENTAL PRESUPPOSITIONS IN THE APPLICATION OF PHILOSOPHICAL IDEAS TO LAW. — LOGICAL AND ACTUAL DETERMINATION. — CONCEPT AND IDEAL. — CRITICISM OF DEONTOLOGICAL DEFINITIONS.

§ 47. *Abstract Unity of Law.* We have gone into far fields in search of what lies in our own thought, where alone we can hope to find it.[1] The fixed point, the constant basis and germ of the conceptual determination of law and the proof of its possibility, lies in the fact that we give immediate recognition to the quality of juridical propositions no matter how different and varied they may be. The idea of the variety of historical legal manifestations actually proves the assumption of a common form, for we could not speak of juridical evolution if we did not first accept a certain abstract unity as common to all its phases, in whose regard a continuity of process was apparent.[2] We do not find the true unity

[1] "Noli foras ire, in te ipsum redi, in interiore homine habitat veritas." *Augustine*, "De Vera Religione," Cap. XXXIX.

[2] *Kant* gives a strict proof of this principle in general, "Krit. d. rein. Vernunft," "Transscend. Analytik.," II Buch, 2 Hauptst., 3 Abschn., 3, A; "Grundsatz der Beharrlichkeit der Substantz," pp. 180–185.

of law either in the multiplicate data of juridical history or in determinations of ideal justice imposed or based on such data. Such unity is only shown by the logical universal of law, that is, by the form of its idea. This form is not exhausted in the content of law and is immanent in respect to its variance, as is proved psychologically by the fact that we include diverse and even contradictory propositions in the single category of law. What these propositions have in common is the essence of law, the sense or formal quality of juridical propositions.

§ 48. *Process of Scientific Thought.* The essence of science lies in uniting the multiplicity of phenomena by conceptual ties. Scientific knowledge is systematic by nature, and system is possible only through the concepts.[3] The crowning glory of Greek philosophy is the discovery and application of this truth. The advance from the sensible particular to the intellectual universal is, according to Socrates, the dialectic process which contradistinguishes and makes true science possible. Socrates, however, did not develop the theory of the universal to the full, and only availed himself of the process, which we would to-day call a process of abstraction, in certain fundamental ethical problems. He can, therefore,

[3] "The life of all science is founded on the collection of an endless variety of apparent phenomena under comparatively few abstract concepts, forming a system by which we can get all phenomena within one mental grasp, to make the past clear and determine the future." *Schopenhauer*, "Die Welt als Wille und Vorstellung," "Kritik der Kantischen Philosophie" (ed. by Grisebach), 1, p. 578. Cf., in this sense, the just considerations of *Petrone* in his "Contributo all' analisi dei caratteri differenziali del diritto" in "Riv. ital. per le sci. giur.," Vol. XXII, 1897, "There is no unity of concept, there is no scientific knowledge in the rigorous sense of the word, where an immutable, essential, and necessary element cannot be abstracted from the processes of mutation, contingency, and growth" (p. 347–8).

strictly be called the founder of ethics. But his great disciple developed the principle of the universal as the condition of scientific objective knowledge and made it the basis of a full conception of the world. Plato believed that the λόγος was the subjective term of an equation, whose objective term was the εἶδος or ἰδέα, the only absolute reality. As there is a perfect correlation between these terms, the concept has a full objective value. But Plato places the reality of the ἰδέα in a transcendental order, of which the sensible world offers only a defective image; whence it follows that the concept is not entirely reflected in the objects of experience. It is equal to the idea and transcends, like it, all phenomena. This gives rise to Aristotle's criticism: that not admitting the χωρίζειν of ideas — their separation from phenomena — he posits essence as immanent in the distinct reality of things. Aristotle thinks a concept an equal subjective term corresponding to objective essence — ἡ κατὰ λόγον οὐσία; but λόγος here has naturally a meaning different from that given it by Plato. It is equivalent to things (being made equal to their essence) and not, as Plato said, equal to the idea, which is beyond things.

§ 49. *Conceptual Abstraction.* It is with Aristotle, therefore, that conceptual abstraction begins to exercise a distinctly logical function in the economy of thought. Logic and metaphysics were confused in the Platonic system, because the concept in it did not correspond so much to reality as to the idea of the true. Aristotle, however, drew a distinction (which is not an absolute separation) between these sciences[4] and assigned to the concept its proper office of objectively synthesizing

[4] On the relations, not always clearly determined, between logic and metaphysics in Aristotle, see *Schwegler*, "Geschichte der Philosophie," new ed., revised by Stern (Leipsic), p. 133 et seq.

the real and representing its essential and constant nature. The theory of the concept as formal unity was so perfected by Aristotle that all attempts in later ages to pursue and elaborate his work have led not to true corrections and advantageous developments but to mere supersubtleties and artificialities, to some of which (it is but fair to say) Aristotle opened the door by his ambiguity, uncertain terminology, and partial contradiction in doctrine.[5] The substance of his doctrine (which it is necessary merely to mention here) is that the formal concept shows the immanent unity of the multitude of things, while the material or content constitutes its plurality.[6] The objective existence and value of the λόγος was really the central idea of all Greek classic philosophy. Then the discussion did not lie around its existence, but the relation between logical entities and particular sensible things.

§ 50. *Realism and Nominalism.* This discussion, as is well-known,[7] reappeared in the Middle Ages. Questions

[5] On this proposition, read *Ueberweg*, "System der Logik und Geschichte der logischen Lehren," 5 ed. by J. B. Meyer (Bonn, 1882), p. 150 et seq. See also the posthumous work of *Rosmini*, "Aristotele esposto ed esaminato" (Turin, 1857), for profound critical considerations of this subject.

[6] "Ὅσα ἀριθμῷ πολλὰ, ὕλην ἔχει. Εἷς γὰρ λόγος καὶ ὁ αὐτὸς πολλῶν ὅίον ἀνθρώπου, Σωκράτης δὲ εἷς," *Aristotle*, "Met.," XI, 8, 1074a. *Schwegler*, in his edition of the "Metaphysics," comments on the passage, "Form is the principle of unity, material the basis and possibility of plurality. As form or concept is the basis, so all men are one (that is, exist as man in the formal sense), although a number of examples of man or concrete men exist. Thus it is only matter which gives rise to distinction, and makes actual plurality possible." Cf. also, "Met.," VI, 8; VII, 7; IX, 2; et passim.

[7] Cf. *Windelband*, "Geschichte der Philosophie," 2 ed. (Tübingen, 1900), p. 222 et seq., and the fundamental work by *Prantl*, "Geschichte der Logik im Abendlande," Vol. IV (Leipsic, 1855–70). Cf., also, *Rosmini*, "Aristotele esposto ed esaminato," p. 15 et seq.

arose whether the universals were "ante rem" the Platonic conception) or "in re" (the Aristotelian conception). Up to this time the great common principle of the objective validity and reality of the universals was followed, but with the discussion of this question, nominalism grew in direct opposition to realism, whether of Platonic or Aristotelian form. Its doctrine was, that the concepts had no actual existence, that only particular and sensible objects are real;[8] "universalia sunt nomina, universalia post rem."[9]

§ 51. *Conceptualism.* Conceptualism (founded by Abelard), distinct from nominalism, though agreeing with it in its denial of the extrasubjective existence of universals, attributed a psychological (and not merely nominal) existence to them. Concepts, in this doctrine which rapidly supplanted the others, were the mental reflection or "a posteriori" synthesis of sensible data.

§ 52. *Innate Ideas.* The ontological question of the objectivity of universals tended to become genetic. And the problem of the origin of ideas was suddenly brought before the new philosophy. The doctrine of innate ideas had a model of systematic construction in Platonism, but the fixing of the human mind as the centre of speculation (which is characteristic of modern

[8] [The mediæval nominalists, as can be seen from this synopsis, correspond to the modern realists. Care should be taken to avoid confusion from this terminology. — *Translator.*]

[9] We must point out that there are many steps between these opposite doctrines. Thirteen different opinions held in the 1100's on this point are well known. Cf. *K. Fischer*, "System der Logik und Metaphysik oder Wissenschaftslehre," 2d ed. (Heidelberg, 1865), § 49. Save for individual, though important, variations, Platonic realism was represented by Anselmo of Aosta (of Canterbury), William of Champeaux, and Bernardo of Chartres; Aristotelian realism by Albertus Magnus, Thomas Aquinas, and Duns Scotus; nominalism by Roscellinus and later by Occam and others.

philosophy) prevented the new metaphysicians of the "a priori" from accepting the absolute objective in the classic sense. They, therefore, attributed a certain subjective quality to the supreme categories of reason. For Plato the problem was of joining the ideas (absolute reality) with knowledge; for modern philosophy the question is reversed. It would explain the relation of knowledge to reality. Psychogenetic research (overlooked by Platonism, in which ontology ruled supreme), assumes a fundamental importance in the modern age. And this research must be pursued all the more actively—for logic's sake — by a school which proposes to prove the empirical origin of ideas, that is, to show that their formation is due to a process of accumulation and re-elaboration of sensible data. Yet, such a study, however ingeniously conducted and however refined in method, is inadequate to give a full explanation of the logical character of ideas, for necessity and universality are elements foreign to experience, but understandable by reason and necessary to certain operations of the human mind. On the other hand, the principle of innate ideas cannot escape serious objections. The marvellous progress in experimental science, more than any dialectic argument, urges every rationalist to the construction of a new theory of knowledge, which will allow an internal synthesis of the elements of essence and growth.

§ 53. *Kant.* The critique of knowledge in the Kantian system proposes to clarify the relations between the necessary and the contingent, between the universal and the particular, between the results of reason and the data of experience. Without denying any of these apparently contradictory and irreconcilable terms, this critique portrays their relations "inter se" and suggests an hierarchical system such as is required by the human mind in its determinate capacity. Kant saw clearly

that the problem of knowledge did not consist in the discovery of a relation of succession among its various elements, but in an architectonic conception assigning to each its proper place in a logical and not temporal order, according to its proper office and value. He regarded the gnoseological function of the "a priori" in this respect in a new sense — to explain logically the possibility of knowledge he started from its actuality, shown indubitably in some sciences, and afterwards considered its conditions, separating those of form from those of content. To the formal elements, he ascribed — as Aristotle had done before him though in a somewhat different spirit [10] — all of the necessary and universal in knowledge, while he made the particular and contingent constitute the material elements or content, given by experience. But these empirical elements must, nevertheless, be conceived of or weighed within those forms. They have, therefore, within themselves the imprint of something which transcends them, inasmuch as the condition of their experience is at the same time the condition of experience in general, the potential synthesis and "a priori" limit of all possible experience. This is the great principle which vanquished nominalism and conceptualism once and for all. *Every empirical datum has within itself the reason for its transcendentality; and this consists in the logical form of its conception*, which comprehends, besides it, all possible experience of the same kind. The Kantian system, appearing as a higher synthesis of the philosophies, then struggling together, seemed destined to establish a lasting harmony

[10] Roughly speaking, as appears from what we have already said, Kant refers to knowledge what Aristotle directly attributes to essence; he considers under consciousness what Aristotle places in the external world. For difference in terminology, dependent hereon, see *Masci*, "Logica" (Naples, 1899), p. 78 et seq.

and co-ordination of purpose among them. This certainly was the purpose of its founder. Disagreements, however, soon reappeared, deep and wider than ever; for each of the two tendencies, believing itself strengthened by the proofs of criticism and relying on different parts of Kantianism, advanced more ardently their opposite systems, joining the motives of their ancient tradition with those which the Kantian critique seemed to have offered.

§ 54. *Positive Philosophy.* The most uncompromising and exaggerated empiricism opposed the new and vigorous growth of rationalistic metaphysical conceptions, the latter guided by the directive principle and implicit premises of the "Kritik," the former invoking its limitative conclusion of the conditionality of knowledge. The so-called positive or empirical philosophy, which had subscribed to the banishment of the transcendental, thought to find in the Kantian proposition that the limit of theoretical knowledge is marked by that of possible experience—an argument in its favor—and proclaimed itself the rightful heir of the "Kritik." Especially now, when a demand for fundamental revision has been made by the various schools opposed to positivism, its approximation to the result of Kantian philosophy has become a generally accepted fact. Yet this approximation is based upon an error, whose full consequence it would be difficult to determine, but which is one of the most serious and pernicious in the history of philosophy. By it, actual experience is substituted for possible experience, that is, the accidental for the necessary, a fact for its law. The limit of actual experience is but experience itself; that of possible experience is the regulative principle superimposed over experience. The purpose of Kant's "Kritik" is to determine the elements which, transcending experience, render it possible.

Modern positivism recognizes nothing in experience which is not given by experience, and is, therefore, a pure and simple negation of the "Kritik."

§ 55. *Precedence of the Concept is Logical.* For our part, holding the dialectic principle, which suggested to Kant the transcendental correlation between category and intuition, form and matter, let us distinguish experience from its condition, which is the element of universality given us with every single fact of experience, but which at the same time transcends it, forming a potential logical centre for an indefinite number of other experiences. Let us call this element (following Aristotelian and Kantian tradition) the form, or we can call it the concept, if we mean by this word not the sum or empirical equivalent of a number (no matter how large) of data, but their essence, universal, superior, and logically anterior to every particular example or application. The question of the origin of the concepts is in no wise prejudiced by this, as might at first seem. The relation of priority between the concepts and the objects comprehended by them is (let us repeat it) logical and not temporal. A specific rule of existence governs logical forms and ideas in general, by which they are freed from historical conditions of growth and the actual effect of causality. No fact can influence an idea, although it may affect its presentation in the empirical world, that is, the essence conceived and realized is subject to the natural laws of eventuality. Considered apart, an idea is not subject to the flight of time but is, by nature, without its jurisdiction, and so one cannot speak of its origin in a strictly historical sense. We see affirmations of ideas, not ideas themselves born. We must consider ideas co-ordinated as to their essence, whereby connections between them will be established not according to precedence of historical appearance, but

with regard to their proper intrinsic sense and value — such is the logical order or system. All this does not mean that a concept as a psychological fact, that is, as it appears in the consciousness, cannot be posterior to the existence and perception of the particular objects in which it is realized. But, although the presence of such objects is usually the occasion and means for the subjective revelation of the concept, and a factor in the explanation of its psychological genesis, it is not the cause of its logical significance, which lies beyond the limit of its psychic birth. As little by little it forms in the consciousness, it shows a retroactive force, which is revealed as the extra-temporal ("a priori") condition of every possible object of its kind. This is a brief statement of the parallelism between ideas and facts, in which we believe. The ideal moment of every concrete object is that which forms it in its essence ("forma dat esse rei"); it has a universal logical value in this: that while it is the condition of being for that object, it is likewise the condition of an indefinite number of similar objects. The ultimate base of science lies in this universality of logical forms, because reality is knowable only through the concepts, and every concept is universal by nature.

§ 56. *Confusion of Logical and Actual Determination.* Before taking up the application of these principles to law, we must add a few words concerning fundamentals. Idealistic philosophical tradition has confused the logical universal, which we have just explained, with other matters of speculation, which should be kept distinct. As we have shown, the universal is the logical condition of the particular: it does not follow from this that there is any causal relation between the universal and the particular, as if, for example, the former produced the latter or generated it by dynamic force. Such an hypothesis adds a creative value to the universal not

implied by its nature. To change a logical form into an efficient force is a metaphysical expedient, which, advantageous though it may be to a certain school, can in no wise be justified by the independent intrinsic demands of thought. The transcendentality of the formal concept in respect to definite objects is purely logical, not dynamic or causal. A concept does not influence things or generate existence, but only constitutes their sense and logical definition. The real cause of a fact can only be another fact. Logical force is "per se" but the sign of a possible existence. Thus we on this point give up both the Platonic and Hegelian conception of ideas. The universal form (λόγος) does not produce its actualization (or birth) in the world, nor is that its aim. The logical form gives essence, not existence. The two principles of determination should not be confused, as Leibniz saw clearly in making his distinction between the truth of reason and of fact, and placed beside the principle of contradiction in the logical order, that of sufficient reason in the scheme of fact.[11]

§ 57. *Confusion of Concept and Ideal.* Another principle often confused with the logical universal is the ideal of perfection. This identification, too, has its origin in Platonic doctrine, where the "idea" is not only the logical universal and the transcendental cause of all existence but at the same time the supreme model and

[11] See *Leibniz*, "Monadologia," § 31 et seq. We must remember in this connection the Aristotelian distinction between formal (εἶδος, τὸ τὶ ἦν εἶναι) and efficient causes (κινητικόν, ὅθεν ἡ ἀρχὴ τῆς κινήσεως, τὸ διὰ τί); which causes or principles, together with the final cause (τέλος, τὸ οὗ ἕνεκα) and the material cause (ὕλη, τὸ ἐξ οὗ), form the four determining points of his whole system. Vide "Met.," I, 3; cf. "Phys.," II, 3. We may note, however, that, according to Aristotle, the first three are reducible to one (cf. "Phys.," II, 7); so the single antithesis of form and matter (whence the concept of motion) remains fundamental.

archetype to which all objects tend as they approach perfection. By giving this meaning to the "idea," two logical functions, equally legitimate and necessary but diverse, are confused — the descriptive, which traces the external limits of a species or class, and the valuative, which establishes an internal gradation of objects in the same class. Such confusion leads to a deontological definition of objects, in so far as in designating their class regard is had not to that which the objects possess in common but to the most perfect possible mode of their existence, that is, to that which they ought to be according to a teleological reason assumed as a norm. The ideal is substituted for the concept in its proper sense.[12] But such grouping of diverse functions in a single dialectic instrument results in reciprocal harm; the distinction of the strictly logical criterion from the deontological is doubtless the result of scientific progress. It is obvious that the logical form must be absolutely equal to all the objects of the species which it determines. Its objectivity lies in this "ratio indifferentiæ" (to quote the Stoics), so that it may comprehend equally the various contents of different exemplars and represent them only in what is identical and essentially common. The formal criterion of definition cannot, however, without failing in its purpose, serve as a means of comparative valuation among various exemplars of the species which it defines. This would destroy the similarity of their content, which is, as we have said, the condition and proof of the

[12] "We must distinguish a definition which is given of an object which is seen, which is actual, from a definition of what the object ought to be, which expresses not so much its concept as its ideal. Herein lies the difference of most men's definitions of one and the same thing. It is the cause of endless disputes." *Frauenstädt*, "Briefe über natürliche Religion" (Leipsic, 1858), p. 94. Cf. *Durkheim*, "Les règles de la méthode sociologique," 2 ed. (Paris, 1901), p. 49 et seq.

objective validity of the concept. The need of intrinsic valuation is independent and in no wise affected by the definition. The adoption of a single principle for both purposes leads inevitably (as is seen in Platonic ideology) to the incongruity of not recognizing things unless in a certain grade of essence, determined by their participation in the universal idea which transcends them. Here, objective truth is sacrificed to preconception. The truth is that the essence of an object is logically perfect and complete, and by it it is classified and there is no gradation possible in regard to it. The participation of every existing object in its concept must of necessity be entire, because otherwise there would be diverse concepts. The gradation or estimation of worth and value must be made by some other criterion, different from that determining the uniform essence of the species. And what is shown best and most perfect by this valuation will not differ in the least, in a logical respect, from what is shown worst and most imperfect, since, by hypothesis, both extremes partake equally of the essence of the species.

# CHAPTER IX

## VALUE AND SIGNIFICANCE OF THE LOGICAL FORM OF LAW

JURIDICAL PROPOSITIONS AS MATERIALIZATIONS OF THE LOGICAL FORM OF LAW. — "QUID JURIS" AND "QUID JUS." — JURIDICAL EXPERIENCE AND ITS LIMIT OF POSSIBILITY.

§ 58. *Formal Definition of Law.* In view of what we have proved so far, we can state without fear of equivocation, that an objective and universal definition of the concept of law must have reference only to its form, in other words, to the logical type, which is necessarily inherent in every case of juridical experience, because it is the sign of the possibility of such experience. By an intrinsic law of thought, the apparent contradiction between the plurality of juridical propositions and the unity of the formal concept is resolved into a true and indestructible inference. Unity is implied and not destroyed by the multiplicity; thus, the single category of law is the condition of the multiplicity of juridical cases; its stability is the basis of their temporal career. An admission that the content of law is mutable forces upon us the recognition of something constant, which allows the reference of the mutability to a common substratum and its formation into a concept. This substratum is precisely the logical form of law, in which all cases of juridical experience coincide, however they may differ in content.[1] It is proper here to show the

[1] Without anticipating the ethical discussion (Cf. Chap. X, p. 85, post) we can note merely that the specificness of juridical phenomenon is recognized by the positivists themselves (or the most

value of this form according to the general principle heretofore outlined.

§ 59. *Every Juridical Proposition is a Materialization of the Logical Form of Law.* Every separate juridical proposition is a materialization of the logical form of law or an application of the latter to a definite content. The content, subject to indefinite actual variation, is accidental in respect to the form, though no juridical proposition can be sustained as such unless it follows the logical form of law, which is so independent of matter or particular content that it may be found equally in intrinsically contradictory propositions.

§ 60. *The Logical Form of Law is More Comprehensive than the Sum of Juridical Propositions.* It is not paradoxical to state in this sense that any distinct datum logically transcends itself because it bears the imprint of a universal form, which renders it possible as well as an infinite number of others of the same kind. The logical form of law is found in every juridical proposition, but is not exhausted in every one of them nor in their sum. It determines absolutely the sense of a juridical proposition, and indicates "pure ac simpliciter" what it intends to affirm in a judgment of right or wrong. Without enunciating any such judgment or attributing the predicates of justice or injustice to any given object, the logical form only outlines the proper qualities of a judgment of that kind. The universality of the formal

consequent of them), for without admitting this, no science or philosophy of law would be possible. Cf. *Fragapane*, "Della Filosofia giuridica nel presente ordinamento degli studii" (Rome, 1899), p. 27. *Romagnosi*, who in spite of the sensible bases of his ideology could reach the greatest abstract heights, thought that "the idea of juridicity" had "perpetual attributes" and defined it as "the complex of those circumstances and relation, which result in one thing being law." "Introduzione allo studio del diritto pubblico universale," § 184.

concept is founded on this, which makes it capable of comprehending diverse objects, still preserving its unity of signification.[2]

§ 61. *"Quid Juris" and "Quid Jus."* The different juridical propositions answer the question, "quid juris?" But, as Kant saw clearly,[3] this is a very different question from that of "quid jus?" It is logically anterior. The answer to this means the determination of the formal conditions of the judgment of rightness, that is, the conditions which are the common synthesis of all juridical propositions whatever their content. Hence, the concept of law cannot be immediately given to us by experience, which "per se" offers us only particular and concrete juridical propositions. Juridical

[2] *J. Stuart Mill*, in "A System of Logic" (Vol. I, p. 172), thus states the problem: "The question, What is justice? is, in other words, What is the attribute which mankind means to predicate when they call an action just?" . . . "To which the first answer is, that having come to no precise agreement on the point, they do not mean distinctly to predicate any attribute at all." This, to tell the truth, is not acceptable. Because men do not agree in their recognition of objects to which they attribute a quality is no reason for holding that they have not an exact concept of the quality. So the fact that men, as Mill says, do not "agree sufficiently with one another as to the particular which they do or do not call just," does not signify that the sense of this term is multiplicate. It is the presupposition of the identity of value of this term which causes actual disagreement, for otherwise there would be only a question of equivocation. *Romagnosi*, in an analogous case, infers the necessary existence of a principal and common idea from the various uses of the word "law." "Vedute fondamentali sull' arte logica," Lib. II, Cap. IX. Vide, also, *Hegel's* reasoning of the unity of philosophy in the variety of philosophies, "Ueber die Geschichte der Philosophie," 2 ed., 1 Th., p. 30 et seq.

[3] "Met. Anfangs. d. Rechtslehre," p. xxxi et seq. *Hobbes* before Kant had drawn attention to this distinction, "Ne quisque disserem de cujuscumque civitatis legibus speciatim, id est, ne *quae sunt* sed *quid sint* leges dicerem." "De Cive," Præf., in fine.

experience is such only in virtue and in function of the logical form of law, and is therefore a "posterius," conditioned and consecutive in respect to the latter. To refer to the experience of law to deduce its concept, to attempt to construct the latter from the data of the former is a true paralogism. The most to which a simple examination of such data and an historical examination of law can lead is a generalization of juridical experience "secundum principia generalia non universalia," but the abyss between generality and logical universality is too deep for any material accumulation or quantitative process to bridge. The distinction between possible and actual experience is — as we have said — not one of quantity, by which something is greater or less, but essentially one of quality, because possible experience is the principle of rational order which expresses the "a priori" limit of experience, — in other words, its condition, the law which governs and transcends it. The determination of possible experience means the determination of a form or category, which, found in empirical cases, is in the logical order prior and superior to them. It cannot be derived from such cases, therefore, no matter how increased in number, because they also imply a presupposition. It is this presupposition which guides us in our historical consideration of law and directs our collection of empirical data. It is the form, ideally fixed and freed from the changes of time which enables us to identify law in the variety of its actualizations and to follow its course in history. Without reference to this purely logical datum, corresponding to the immutable nature of the object, juridical experience would not be such nor would it have unity of signification; without the form which gives it essence, law would not be law.

# CHAPTER X

## LOGICAL FORM OF LAW OPPOSED TO JURIDICAL EMPIRICISM

ATTITUDE OF DIFFERENT SCHOOLS IN REGARD TO THE LOGICAL FORM OF LAW. — CLASSICAL LEGAL PHILOSOPHY. — DOGMATIC HISTORICISM. — EMPIRICAL HISTORICISM AND THE CONFUSION OF SCIENCE AND PHILOSOPHY. — KANT AND JURIDICAL EMPIRICISM. — INSUFFICIENCY OF THE HISTORICAL AND POSITIVE DOCTRINES IN RESPECT TO PHILOSOPHY OF LAW. — CONCEPT OF LAW IN THE IDEOLOGY OF POSITIVISM. — HISTORICO-GENETIC METHOD AND ITS LOGICAL BASIS. — IDENTIFICATION OF THE DATUM AND FUNCTION OF THE FORMAL CONCEPT IN EXPERIENCE. — EMPIRICAL RECOGNITION OF LAW AS AN "A POSTERIORI" PROOF OF THE APPLICABILITY OF THE CONCEPT. — RETROSPECTIVE QUALITY OF THIS RESEARCH. — LOGICAL PRIORITY OF FORM.

§ 62. *Modern Research and the Formal Concept of Law.* In the preceding pages[1] we have outlined the contributions which the more general current of contemporaneous thought has given to the knowledge of phenomenology or empirical content of law. We have seen that modern observation, explaining the reasons for the diversity of institutions in connection with their real coefficients, has made a true and marked scientific progress, inasmuch as it has inaugurated the historical view of positive law, which antecedent juridical philosophy lacked. At this point in our work we should weigh these studies by another standard, that is, by

[1] Cf. Cap. VI, p. 32, ante.

their applicability not to the historical content but to the logical form of law. In other words, we should examine the attitude of modern schools in relation to the formal concept of law. Such an examination opens the door to the clarification of the philosophical basis and character of the concept.

§ 63. *Classical Juridical Philosophy and the Formal Concept of Law.* Classical juridical philosophy generally admitted the objectivity of universals, and recognized that the concept of law, being founded in reason, did not depend on positive legal institutions but surpassed and dominated them. This philosophical tradition can be traced directly to Plato, who, in accordance with his fundamental doctrine, taught that the general vision of justice, over and above the particular different objects to which the predicates of just or unjust apply, forms the condition of juridical knowledge, contradistinguished from mere opinion.[2]

§ 64. *Natural Law and the Formal Concept of Law.* We must point out, however, that the purely logical concept of law was generally prejudiced by its almost constant confusion with the analysis of other elements of the philosophical theory of law. The schools of natural and rational law erred especially in not distinguishing (as they should) between logical and ethical or deontological demands. They have more than once tried to solve these two distinct problems by a single

[2] Vide esp. the last chapters of the fifth book of the "Republic," where the antithesis between γνώσις and δόξα is made clear with particular attention to its relation to law: "τοὺς ἄρα πολλὰ καλὰ θεωμένους, αὐτὸ δὲ τὸ καλὸν μὴ ὁρῶντας μηδ' ἄλλῳ ἐπ' αὐτὸ ἄγοντι δυναμένους ἕπεσθαι, καὶ πολλὰ δίκαια, αὐτὸ δὲ τὸ δίκαιον μή, καὶ πάντα οὕτω, δοξάζειν φήσομεν ἅπαντα, γιγνώσκειν δὲ ὧν δοξάζουσιν οὐδέν." "Rep.," Lib. V, Cap. XXII, 479 E. Whoever sees only the concrete cases and fails to see the universal idea of law, would be, in Plato's mind, φιλόδοξος and not φιλόσοφος. Cf. ibid., 480.

doctrine. In seeking the logical qualities of law, they attempt to establish its ideal paradigm, or principle, to use an ambiguous word. The relation between such principle and positive legal institutions was variously described, but, as the principle implied a definite though perhaps very general content, that is, a maxim of justice whose effectivation was sought, so it necessarily showed a tendency to oppose this philosophical determination of law to those already realized in existing historical institutions. But, it is clear that while the opposition of an ideal to empirical reality is the legitimate expression of a valuative and deontological need, the ideal itself could not then equal the reality, that is, coincide with it and define it logically, so as to fulfill the function of a concept.[3]

§ 65. *Phenomenism and the Formal Concept of Law.* There could not fail to be a reaction against this method, which in a blind obsequiousness to pure reason deliberately disregarded the mass of empirical data (as if the exact comprehension of such data were not the highest duty of reason). This reaction began about 1800, and has continued and grown under various guises until the present time. The followers of the new school at first tried with audacious dialectic force to make the ideal of law consist in historical reality, thus identifying the terms of the traditional antithesis, which, of course, continued to exist in the mind. On one hand, a theoretical concept of history arose, which considered it "a priori" as the revelation of the juridical absolute; on the other hand, for the same reason, the value of this absolute was reduced and the office of rational speculation about law was lessened, and restricted to empirical data. Whoever looks carefully can see that the mantle of the most transcendental idealism covered a supine realism in such

[3] Cf. § 57, ante.

a philosophical scheme, and the secret spirit of empiricism that was hidden in the doctrine was destined soon to predominate and burst forth, destroying the shell of the idealistic formula. From the "a priori" identification of reason with fact to the assumption of fact as principle is but a step, and an inevitable one. In fact the most severe phenomenism succeeded the dogmatic cult of the ideal. We have already noted how abstract speculation generally gives place to concrete, and deduction to induction.[4] This advance, with the advantages of the historical studies of law, would have been absolutely legitimate and rich in results, if it had been based on a distinction of the duties and methods of the science and philosophy of law. Science, to attain its ends, should be freed from dogmatic theories, imposed upon it by a defective ideology. Only when so freed can it extend and improve the study of positive law, and complete the examination of its relations and real elements with absolute objectivity. But, as in every reaction, phenomenism passed all bounds. The empirical theory of law, in attacking a certain philosophy, made war on philosophy in general. And, having lost the sense of hierarchical equilibrium between philosophy and science, it nourished the illusion of forming, with its own data, not only a science but a philosophy—in substance, the destruction of the latter. It endeavored to explain the ultimate essence of law, or at least as much of it as man could grasp, by a simple phenomenological study, as if juridical phenomenology could find in its own breast the principle and conditions upon which it logically depends and which are the object of philosophy.

§ 66. *Kant and the Formal Concept of Law.* The empirical or positivistic reaction overthrew all that

[4] Cf. § 42, ante.

which precedent speculation had established as universal. And, as the various schools of natural or rationalistic law had confused the ideal of justice and the formal concept of law in one principle, so the reaction eliminated both because of a metempirical element common to them, and did not distinguish between function and essence. The deduction of law, even as a logical unit, from pure reason seemed a dangerous and absurd proposition to the new schools, but they had no doubt that it, as well as the content of law, could be ascertained by a process of inductive generalization from a study of empirical data. Kant foresaw the danger arising from this kind of empiricism in juridical philosophy. He had already overcome empiricism in general philosophy by criticism; and demanded recourse to pure reason as the indispensable method to be followed in the doctrine of law as well as elsewhere. He denied expressly that this method could only be founded on a basis of experience. In a passage in "Metaphysische Anfangsgründe der Rechtslehre," he writes, "What is law? When this question does not fall into tautology, but refers to a universal solution of what is the rule for every country and every age, it throws the jurists into as much confusion as the challenging summons 'What is Truth?' throws the logicians. What is lawful, 'quid sit juris,' that is, what the laws are on a given point at a given time, can easily be told; but what law is, that is, the universal criterion by which right can be distinguished from wrong, 'justum et injustum,' remains hidden, unless empirical principles are left far behind, and the sources of the judgment are sought in pure reason (although individual laws can serve as a useful guide) in order to form the groundwork for possible empirical legislation. A simply empirical scheme of law, like the wooden head in the fable of Phædrus, is a head, beautiful to look upon, but

which has, alas! no brains!"[5] In thus sketching almost incidentally the critique of juridical empiricism, Kant did not and could not have intended to refer to it as a doctrine that was systematized or largely followed. The mere historical consideration of law, whose insufficiency he felt so strongly, had hardly begun to be advanced as a principle of a philosophical order opposed to rationalism. It was later that it acquired favor, even greater than that of empirical theories over general philosophy in Kant's time, or else he would have alluded to it in his critique. In respect to philosophy of law in particular, empirical criticism would not then have answered any immediate need. He did not, therefore, think it necessary, as he very probably would have thought now, to introduce it "ex professo," and in his treatise on law he goes on without further comment to give the supreme principle, that is, the "a priori" maxim of the rational juridical system. He does not really oppose the then dominant concept of the duty of the philosophy of law. The questions which were vital in his generation were those concerning the nature of the juridical principle: — the origin and ultimate purpose of law and of ethics in general — these questions Kant answered according to his system, as everyone knows. But no school then held that philosophy of law was confined to historical reconstruction, according to data of

[5] "Met. Anfangsgr. d. Rechtslehre," p. xxxi et seq, "Einleitung in die Rechtslehre," § B. *Hegel*, too, said that the concept of law must be given by philosophy to jurisprudence, so that, in the Hegelian concept, jurisprudence not only supposes philosophy, but forms a part of it. "Science of law is a part of philosophy — as part, it has its fixed starting-point, which is the result of what was anterior, and of what offers a so-called proof of it. The concept of law therefore is put without the science of law, its deduction is foreign and is accepted as given." "Grundlinien der Philosophie des Rechts," § 2.

exterior observation. The whole spirit of the "Kritik," not only in the part concerning practical reason and more especially in the "a priori" deduction of the juridical imperative, but in the theoretical part as well, where it teaches the abstraction of the logical condition governing experience from experience itself and fixes the immutable foundation of science in this power of synthesis, is everywhere opposed to this doctrine, which, then in a state of formation, was destined soon to assume such powerful proportions.

§ 67. *"Historische Schule" and the Formal Concept of Law.* In fact the conclusions of the Kantian critique, regarded from one point of view alone, served as an apologia for the new forms of empiricism. What took place in general philosophy was repeated in the philosophy of law.[6] While the juridical thought of Kant was strictly followed by the school of the "Vernunftrecht," it was at the same time upheld by Gustave Hugo, the founder of the "historische Rechtsschule," who declared that he was a follower of Kant in his exclusion from the theory of law of all that which is not founded on experience.[7] This, as appears from what we have said already, was a grave error, which can, however, be explained by the fact that Hugo paid but little attention to a large part of Kant's works, and none to his principles. In fact there can be no doubt that the revolution of methods effected by the historical school of law was brought about by doctrinal and political motives very different from those which inspired Kant with "Zum ewigen Frieden" and "Metaphysiche Anfangs-

[6] Cf. § 53, ante.

[7] Cf., for historical data on this subject, *Landsberg*, "Kant und Hugo" in "Zeitschrift für das Privat- und öffentliche Recht der Gegenwart," Bd. XXVIII (1901), III, IV Heft. Landsberg, however, does not show the error noted in the text.

gründe der Rechtslehre."[8] The work of the new school was restricted, as we have already pointed out,[9] to sketching the formation of positive law. Omitting every deduction of a rational nature, the concept of law was not studied as a true and proper logical entity, but was only considered in its concrete manifestations, that is, as shown in the data of experience. And while a higher principle, the "Volksgeist," was made to control its manifestations, it was both vague and indefinite,[10] and was at the same time the foundation for all formation of culture. So the logical unity of law was deprived of all specific base, and, so to speak, drowned in the tide of historical reality. As a result of these insufficient premises, the concept of law was finally "pure ac simpliciter" affirmed by the historical school as a postulate which it could not resolve into its proper elements. Attempts at definition according to canons of the school resulted in mere tautology.[11] The impossibility of obtaining in history a knowledge of the universality of law, and, therefore, of its concept, was recognized and used as an argument against the "historische Rechtsschule."[12] Notwithstanding this serious defect, the

[8] For the true forerunners of the historical school, see *Stahl*, "Geschichte der Rechtsphilosophie," Book VI, p. 548 et seq; *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," I, p. 187 et seq.; *Landsberg*, "Geschichte der deutschen Rechtswissenschaft," III Abth., I Halbband (Münich, 1898), p. 496 et seq.

[9] Cf. § 41, ante.

[10] Vide the fine analysis of the character of the "Volksgeist," by *Miceli*, "Studi di Psichologia del diritto," I, p. 66 et seq.; *Gierke*, "Naturrecht und deutsches Recht," p. 9. Cf. *Del Vecchio*, "Il sentimento giuridico," 2nd ed. (Turin, 1908).

[11] For example, *Puchta's* definition, "Law is a common conviction existing in juridical society." "Pandekten," 12 ed. (Leipsic, 1877), § 10.

[12] "The historical school gave in the last analysis no answer to the question, 'What is law?' An appeal to juridical history has

fundamental thought of the school continued to be generally received even after the school's decline, which has not had, therefore, as essentially renovative a significance in juridical philosophy as if it had been caused by the development and prevalence of contrary directive ideas. The decline, on the other hand, was the result of the penetration of most of the school's teaching into the common consciousness, and of the consequent failure of the polemics which were the immediate cause of its strength.[13] But the reasons of the downfall of Hegelian philosophy necessarily banished the dogmatic elements,

no value here. It shows in particular what Roman or Teutonic law is, but not law in general." *Bluntschli*, "Der Rechtsbegriff" (1858), republ. in "Gesammelte kleine Schriften," I Bd. (Nördlingen, 1879), p. 5. *Geyer* wrote to the same effect, "The historical science of law can make clear only what positive law is. The comparison of the laws which govern nations (or mankind) cannot be a deduction of law from the data of other historical circumstances and forms; it can only be a generalization." "Philosophische Einleitung in die Rechtswissenschaft" in "Encyklopädie der Rechtswissenschaft" of Holtzendorff, 4 ed. (Leipsic, 1882), p. 6; cf. p. 46. We may also refer to an Italian legal philosopher, "History by itself can only show the applications of law, not its idea, which lies without all experience. History shows law and un-law equally, and woe to him who has recourse to it alone for the principles or bases of law!" *B. Poli*, "Sulle opere di Vincenza Gravina," in "Saggi di scienza politico-legale" (Milan, 1841), p. 138. Cf. also *Prisco*, "Principi di Filosofia del diritto sulla basi dell' Etica" (Naples, 1872), p. 27. A strong proof of the insufficiency of historical analysis for the determination of the concept of law was given by *Krause* in his posthumous work, "System der Rechtsphilosophie," edit. by von Röder (Leipsic, 1874), p. 19 et seq. Cf., among the more recent criticisms of historicis n in the philosophy of law, *Schuppe*, "Die Methoden der Rechtsphilosophie," in "Zeitschrift für vergleichende Rechtswissenschaft," Bd. V (Stuttgart, 1884), p. 209–274; *Stammler*, "Ueber die Methode der geschichtlichen Rechtstheorie," in "Festgabe zu B. Windscheids 50. jährig. Doctorjubil." (Halle, 1889), pp. 3–63.

[13] Cf. *Bluntschli*, "Die neueren Rechtsschulen der deutschen Juristen" in "Hall. Jahrbücher," 1839, 2d ed. (Zurich, 1862), p. 27 et seq.

which gave the historical school, in spite of party polemics,[14] a destiny of its own; hence the abandonment of certain formulæ, held intangible before, and now recognized as too restricted and absolute — at all events unnecessary.

§ 68. *Transformation of the Historical School.* The more apparent characteristic elements of the school in this way fell off, but there remained — much freer in its larger field — that which had constituted the original motive and secret strength of the school — its empirical spirit. In it the empirical spirit was presented as in a kind of metaphysical wrapper. Born in an age of philosophy, as the opponent of the "philosophische Schule," the historical school had a certain philosophical character, and in spite of lack and vice of principle it introduced some speculative elements into the conception of law. When these began to disappear under the influence of increasing anti-metaphysical tendencies, the school lost its specific nature and seemed spent while it was actually only transformed.

§ 69. *Positivism and the Formal Concept of Law.* Historicism then advanced a strictly empirical program, under the leadership of dogmas not of "the historical revelation of the idea" but of "positive philosophy," which had grown up in England and France. Real experience taken as the test and limit of knowledge — observation

*Savigny* recognized finally that the work of the historical school was completed and that, therefore, it had no excuse for further existence as a school. Vide, his "System des heutigen römischen Rechts," I Bd. (Berlin, 1840), Preface, p. xiii et seq.; cf. *Stintzing*, "F. C. von Savigny," (Berlin, 1862), p. 52 et seq.; *Bekker*, "Ueber den Streit der historischen und der philosophischen Rechtsschule" (Heidelberg, 1886), p. 11 et seq.

[14] For these polemics, which implied no fundamental difference, cf. *Stintzing*, "F. C. von Savigny," p. 47 et seq.

of facts placed before the ideas to which the facts correspond in such a way as to deprive the ideas of any character of principle — such were the methodic fundamentals more or less recognized and expressed by the new positivism. With observation restricted to positive law, and the existence of any other law denied (by the manifestly paralogistic reason that history — the science of positive law — could only show positive law), this study began, following the course of the historical school, to retrace the concrete elements of the process of the formation of institutions. At this point we must concern ourselves more with the external part of the study or what it excludes than with the internal part or what it includes, because, strange to say, the philosophical character of the positivist school lies chiefly in its negations and limitations.

§ 70. *The Immediate Effect of Positivism in Juridical Philosophy.* The immediate consequence of the prevalence of positivism in juridical philosophy was the deliberate abandonment of the problems of the intrinsic nature of law, which philosophy had dealt with throughout its history and which naturally arose again in every man's mind. All the great traditions of juridical philosophy were thus broken. The study of the just "in se," which had been its object from the days of Socrates and Plato, was declared a mental error, and the metaphysical needs of reason in respect to the "bonum et justum" were left as unsatisfied propositions. From this sprang the lack of proportion and the divergence between the science and conscience of law, by which the former showed itself incapable and reluctant to explain, let alone systematize (as would seem its proper function), the logical and ethical data of the latter. Because the philosophy of law so destroyed and perverted its own nature, it is to-day reduced to a state of muteness before

the legislative and political reforms which are everywhere being realized, and must be a simple spectator of the progressive changes in justice, which it ought to control.[15]

§ 71. *Systematic Negation.* Positivism makes a systematic denial of the concept of law as a datum of pure reason. By the exclusion of this datum, in homage to dogma, attempts are made to show the possibility of a departure from every logical "a priori" in the historical

[15] And, yet it is evident that the positivist programmes, accepting the reality of experience as their only principle, are insufficient for the solution of the practical or deontological problems in their attempt to establish a law which transcends reality and precedes and imposes itself thereon. We know that some positivists have made ingenious attempts to avoid this result and to attribute a practical function to the empirical philosophy of law. Some have gone so far as to admit the phrase "natural law" again, adding, however, that the only true (?) law is the positive. We note this movement, which to our way of thinking, betrays the underlying inconsistency of the doctrine, for we do not believe that elasticity of formulæ can cure a contradiction of principle.

Fragapane, in closer agreement with positivist doctrine, held that no true and proper practical function belongs to the philosophy of law. This apparently negative conclusion is the only one possible, if we accept the premises. Vide *Fragapane*, "Obbietto e limiti della Filosofia del diritto," Vol. II, Cap. IV. See also, in various senses on the same point, *Merkel*, "Ueber die Verhältnis der Rechtsphilosophie zur 'positiven' Rechtswissenschaft und zum allgemeinen Teil derselben" in "Zeitschrift für das Privat- und öffentliche Recht der Gegenwart" Bd. I, 1874, and then in "Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und der Strafrechts," I Hälfte (Strassburg, 1899), p. 291 et seq.; *Stammler*, "Ueber die Methode der geschichtlichen Rechtstheorie," p. 20 et seq.; "Wirtschaft und Recht," p. 169 et seq.; *Vanni*, "La funzione practica della Filosofia del diritto considerata in sè ed in rapporto al socialismo contemporaneo" (Bologna, 1894); "Filosofia del diritto," §§ XII, XIII; *Carle*, "La Filosofia del diritto" I, p. 420 et seq.; *Groppali*, "La funzione pratica della Filosofia del diritto" in "Riv. Filos.," Anne VI, Vol. VII, 1904, Fasc. IV–V.

examination of law. The reasoning may be outlined as follows. Our juridical knowledge has its principle and base in that which constitutes law in the objective world. Law is naturally an historical fact. Its actualization in given times and places is the original reality from which all ideation is derivative, a "consecutivum." The presence of this reality leads human thought to discern and fix in some way that which in fact is pre-existent to it. Psychical formations arise slowly. In this process the empirical perception of the particular is a "prius." The gathering of many similar data generates a complete image in the mind. The stronger and more lasting impression is made by common elements, while the divergent particularities are elided. Then the concept or idea of the "genus" is formed from the common elements. It has no value as a principle and has no objective existence. Such a belief (of course, in the positivist sense) is a mental illusion. To conceive of essence as a rational scheme would mean placing the authority of a copy, necessarily imperfect and warped, over the basic reality of the original. To increase our knowledge of law (to follow the logic of positivism), we should not re-examine the concept of law, as we already have, and go over theoretical elements already too well worn, but should refer to the living source and study law in its various historical phases in relation to its determining conditions and functions. In this way we can correct and complete the definition of the concept itself according to the true requirements of science, as historical observation reveals to us its actual character. The rudimental and irreflective process, which we mentioned above, by which the perception of similar data generates in the mind a typical or medial representation, is here repeated scientifically with a full knowledge of the end and a greater richness of means or of matter

for study. What we find common to all the juridical phenomena which we examine can be ascribed to the generic idea of law, while the work of examination will of necessity lead us to rectify any partial or mistaken conception which we may have had. Dogmatic preconceptions will dissolve in the crucible of experience and the elements founded on the historical reality of law will appear. These are the arguments of the new positivism, which would substitute historical examination, including genetic and comparative research, for idealogical speculation even in the analysis of the concept of law.

§ 72. *Criticism of the Positive School of Law.* There can be no doubt that one of the chief sources of juridical science lies in the data of experience. The discovery of the historical content of law by pure speculation would be impossible, and every prejudice which tends to restrict the study of facts or diminish the objectivity of conclusions should be held illegitimate.[16] For this reason the correction of the traditional methods, which confused empirical with ethical or rational research, was necessary and salutary. But, when juridical historicism or positivism, exchanging the terms of science for those of philosophy, treated external observation as something simple and primary and held that the data of experience formed the principle of the idea of law, and that this idea was itself the result of a series of observations which were made without any mental form or logical aid, it fell into one of those paralogisms which

[16] For special precautions necessary in the study of social facts, see, besides such systematic treatises as "A System of Logic," Vol. II, Bk. VI, by *J. Stuart Mill*, and "The Study of Sociology," by *Spencer*, the essay by *Gabba*, "Alcuni più generali problemi," esp. Vol. I, Lect. III–VI; Vol. II, Lect. IV; and *Fragapane*, "Il problema delle origini del diritto," p. 113 et seq.; "Obbietto e limiti della Filosofia del diritto," Vol. II, p. 85 et seq.

reveal the organic inconsistency of a system, and are a sure sign of a disregard of the principles of general critical thought. Critical thought teaches that the world, as our representation, is only a function of knowledge, which is essentially the organ of ideas, and that this lofty point of view should not be lost under an accumulation of empirical data, no matter how large. The world always remains to be considered as a supergrowth from knowledge, and yet, as such, is subordinate to the ideal determinations in which it is exercised.

§ 73. *The Reality of Law Depends Logically on its Ideal Form.* So the reality of law logically depends upon its ideal form. Observation of fact, no matter how extensive, cannot exceed or dispense with this form. The reason for the dependence of reality upon form is not in fact quantitative but logical, and, in the proper sense, transcendental. By an intrinsic necessity of thought, law is not law except by virtue of the ideal form which determines it, and nothing can be known as law except in relation to form itself. To state that knowledge of empirical data is possible without and independent of the concept of law, and that this is formed by the collecting of like examples, is the same as holding that the data themselves lack "in se" the determination which we find in them and have, so to speak, an alogical existence. Nor is this all; because, for this statement to be true, we would have to suppose that juridical data could pass as such into knowledge, without receiving any conceptual imprint. Thus, objective alogicism should be upheld in the subjective order as knowledge without having any quality of subjectivity, as a conception without a concept, which is contradictory. The fact is, however, that the data of juridical experiences are such not through arbitrary nomenclature, but because of a certain essential character which forms

their specific nature and which is the logical form of law. Only with this character in mind can we recognize juridical data. Their identification thus made consists in our recognition of the universality of form, which is common to the entire species, in a particular content.

§ 74. *Genesis of Positivism.* If the student can collect and compare the laws of different peoples and study their life from this point of view, "sub specie juris," or, as it were, trace the juridical profile of history, which cannot be a mere accident; he, the student of law, should already possess, at least in germ, the idea to guide him in the choice of data, and should know universal law to help him in his gathering of particular law.[17] If, however, after completing his research, he forgot the principle which guided him in it, and the original logical intuition which alone enabled him to recognize law as uniform in this and that fact, he would then suffer from the illusion of having obtained his idea from the facts themselves, whereas in fact he *recognized* it. He would then attribute a synthetic meaning to the analytical work of historical examination. He would think he had gotten by such a study not only the particular character of different juridical examples but also the formal concept, which preceded his work and made it possible. This illusion is the result of the tendency which the human mind manifests to skip the natural order of knowledge, treating

[17] Cf. *Schuppe*, "Die Methoden der Rechtsphilosophie"; "Rechtswissenschaft und Rechtsphilosophie" in "Jahrbuch der internationalische Vereinigung für vergleichende Rechtswissenschaft," 1 Jahrg., I Abt. (Berlin, 1895), p. 217 et seq.; *Stammler*, "Ueber die Methode der geschichtlichen Rechtstheorie"; "Wirtschaft und Recht," p. 12 et seq., p. 495 and note 171; *Petrone*, "La fase recentissima della Filosofia del diritto in Germania," esp. p. 181 et seq.; *Bartolomei*, "Lineamenti di una teoria del giusto e del diritto," Pt. I (Rome, 1901), Cap. VII.

secondary and derivative cognition as original and autonomous. Thus it is that practice mocks theory, experience logic, and physics metaphysics. The appearance of reason, which can be formed in this substitution, comes only from the fact that sometimes subordinate cognitions have acquired a latent imprint from principles, which they then disown. They can only do without them in appearance to the extent to which they have assimilated them. From such mental insubordination and ingratitude (which is really an inconsequence in method) comes the modern empirical science of law, heralded as a philosophy. To say that the concept of law exists only in what is given by experience is to deny a principle while relying on its results, because law could not be determined by experience if its concept was not first averred and applied in experience.

§ 75. *Logical Antecedence of Concept.* The logical antecedence of concept in respect to fact is discredited by the temporal sequences of fact. This is not the question, nor does the answer lie in the recognition of gradual historical development. No one denies that the empirical development of law is accomplished by almost imperceptible steps. But the question really is whether the concept of law is determined by the happening of what represents it, that is, by the series of juridical facts, or whether these facts, for the very reason that they are juridical, are not logically determined by the concept. Surely it is one thing to follow the process by which a certain fact grows and is accomplished, and a very different thing to define the logical nature of that fact or the concept to which it corresponds. The logical determination allows a recognition of growth, but does not grow itself. Whoever, for example, builds a house does not thereby make its concept with it (which is anterior to and independent of such

construction), but only applies and furthers it. In the same way, the concept of law is not created in the creation of the fact wherein it is given concrete existence. It is not a consequence of such realization, but, in fact, a primary and universal condition of this reality, which is only an episodical and contingent application of it.[18] The problem is not one of genetic research. It is philosophical, not scientific, and cannot be resolved by historical examination. Such examination has not (strictly speaking) the concept of law for its object, but only its various empirical examples; that is, not its pure logical form, but its concrete and particular actualizations. We can call upon history in vain to teach us what law is. It can only tell, and in fact constantly keeps on repeating, where, when and why its particular guises appear. An anterior notion of the object of the research is indispensable, however, both for a comparative as well as a genetic study.[19] Only by applying the concept of law can we know when reality begins to present its characteristics; only by means of the concept can we recognize the primary and rudimental

[18] Contingent, of course, only in respect to the concept, in which it is capable of an indefinite number of diverse applications. In respect to concrete reality or natural order we cannot speak of contingency, for every fact is causally determined. "In rerum natura nullum datur contingens, sed omnia ex necessitate divinæ naturæ determinata sunt ad certo modo existendum et operandum." *Spinoza*, "Ethica," Prop. 29. Cf. *Dilthey*, "Einleitung in die Geisteswissenschaften," p. 494 et seq. Vide, also, § 60 of the text, ante 1; and Part III, Ch. II.

[19] This is the meaning of *Descartes'* maxim, "According to the laws of the true logic the question, if such a thing exists, must be preceded by the question of what it is." "Méditations, Réponse aux premières objections." Cf. *Sigwart*, "Logik," I Bd., p. 381. "The question whether a concept fully determined by logic answers a complex object is first determinable when a concept of it is had, and when it can be compared therewith."

qualities of juridical phenomenology, and ascribe them mentally to their proper logical order. Our work in this branch of study, too, is therefore based on the formal concept. This does not mean, however, that it can be found fully developed in reason from the start. As law is realized in history by degrees, so its notion is developed in the subjective mind by a slow process of development.[20] Here, however, we should be careful not to fall in error. The formal concept of law is implied in the knowledge of any juridical fact whatsoever, but at first it is confused with the perception of the accidental elements which form the content of special cases. The universality of the concept cannot be found except by degrees, as it is abstracted and freed from the different particularities of the cases under consideration. It is not fully understood except by a long cognitive process, and after the step from the accidental to the essential, from the sensible to the intellectual, has been taken. In this process, too, the examination of historical data plays an important part. But it is only the occasion or means of recognizing and distinguishing reflectively the logical form which governs this branch of knowledge from the beginning and was latent in its lowest degrees. Empirical data, no matter how diverse in content, are learned or conceived of in a uniform way (as phenomena of law). This is what leads us to distinguish the common conceptual form from the

[20] Kant's doctrine, which we have referred to (n. 5, p. 3), must be kept in mind here, and can be compared with Vico's thought: "As some eternal seeds of truth are buried in us, which from youth are constantly cultivated until with age and discipline they develop into the clearest scientific cognitions, so in mankind the eternal seeds of justice were buried at the Fall, which constantly from the infancy of the world with the development of the human mind in its true nature, have grown into demonstrable maxims of justice." "Scienza nuova" (1st ed.), Lib. II, Cap. IV.

various content. The concept which is recognized by abstraction is, therefore, actually applied from the first perception of such data. And all the successive discoveries, although aided by experience and in a certain sense founded on it, have their true base in the original logical synthesis. We must always keep clearly in view the anterior conditions which have determined the homogeneity of the conception and made it possible.

§ 76. *Anterior Identification of Empirical Manifestations of Law.* When, therefore, we consider juridical phenomena in history and try to obtain the concept of law from their data, we are in actual fact relying on our anterior identification of them. We cannot get away from this identification, which is the true motive and foundation of all posterior reflection. Let us follow analytically the original synthetic process; let us determine in regressive fashion the elements and conditions which have formed our conception of juridical experience. Every recognition of the juridical nature of a phenomenon has, in this sense, a retrospective character. In other words, it presupposes the formal concept of law and is implicitly based thereon. Hence, in every case, the form which gives its definite quality to juridical reality, and is subjectively manifest in our identification of it, is a true logical "prius." What the essential elements of this identification are becomes clearer, as we have said, when we advance by a process of abstraction from empirical knowledge to a pure formal conception. In this process historical studies can be of aid, inasmuch as they are an "a posteriori" proof of the applicability of the concept. Genetic studies are particularly fitted for such service, for they show at what point certain facts of historical evolution acquired a juridical sense or nature. The logical form of law is here subjected to a crucial test, because the observer

can see what the modifications are whose presence shows the character of law, and whose absence entails its loss. But here, too, it is a question of a posterior and retroactive application and exercise of the concept of law, which is not originally taught by the phenomena under examination, but is only suggested by them and recognized when they conform to it. A genetic examination, in fact, offers us only an opportunity to go over reflectively the primal and immediate identification, which necessarily precedes it.[21]

§ 77. *All Law is Equally Universal.* Fully developed historical law (that of the progressive nations) cannot be substituted for the idea of the pure form of law. The recognition that law presents itself fully developed with all its essential characteristics in a certain evolutionary stage is, for the reasons we have already given, an application of the concept of law, which is, in this case too, presupposed and not originally discovered. Furthermore, the so-called fully developed or differentiated law does not offer the concept of law in its integrity, but only represents it in a certain concrete state. Thus the law of progressive nations is only a particular

[21] This is true also in the case where historical observation leads to the correction of an acquired notion. As the abstraction of the formal elements is not completed, elements may be included among the qualities by the concept, which belong to the content of the examples studied, but which are only common by chance. In such a case a more extended experience, showing examples of the same order which lack these accidental qualities, makes it clear that the concept does not depend on them. In this way the first notion is corrected, and a step taken towards the true formal definition, which is then found within the term of gnoseological process. In this correction, however, we cannot fail to see that new examples are recognized as juridical, though their content is diverse. The original and fundamental proof is the recognition of the identity of the species. This shows the error of the empiricists in believing that reality can be opposed to concept as something distinct and primary.

configuration and phase of juridical evolution, which other configurations and phases will succeed (as others have preceded). Its only universal element is its logical form which, however, as it comprehends all juridical reality potentially, is not and can not be equal to any single case. There is but one means to attain and define logically the true universality of law: to leave the contingency of content for the necessity of form, which is necessary because it constitutes the conceptibility of law, and therefore is common to all possible cases of experience. It is not true that the formal concept is an imperfect and biased copy of concrete and sensible things (as the logic of the empiricists holds). On the contrary, things themselves give only a partial view and passing representation of the concept, which is the essence of law, and which is found in its completeness only in pure reason. The fact of the psychological genesis of the concept is not in opposition with this principle. Leibniz teaches that we must learn our innate ideas;[22] this means that little by little what has been virtually in our knowledge from the beginning discloses itself. What is the conclusion psychologically is the beginning ontologically, and the subject can reach the object adequately only by these two extreme terms. Truth does not begin at the moment of its recognition, and, to use a classic simile, the law of equality of the radii governs before the circle is drawn. So the logical form of law is a primary datum of reason, notwithstanding that its slow manifestation in knowledge follows, parallel with the development in history of the reality which corresponds to it. Its objective anteriority is proved by the nature of the process of cognition, which, as we have shown in our analysis, takes place in relation to this form.

[22] "Neue Abhandlungen über den menschliche Verstand," Lib. I, §§ 23–27.

# CHAPTER XI

## LOGICAL FORM OF LAW: CONCLUSION. CRITICAL AND COMPLEMENTARY NOTES

GENERAL LOGICAL DEMAND OF SCIENCE, AND OF JURISPRUDENCE IN PARTICULAR. — FORMAL CHARACTER OF LAW AND "ALLGEMEINE RECHTSLEHRE." — PHILOSOPHICAL MEANING AND OBJECTIVE VALUE OF FORM. — CRITICAL DELUCIDATIONS. — CONCEPT OF LAW AS FORMATIVE POWER. — CONCEPT AND IDEAL OF LAW.

§ 78. *Science of Positive Law.* The principles of method, which we have sketched so far, are in marked contrast to others, very widely diffused to-day, whose insufficiency we have attempted to prove. We may say, however, that the disagreement lies in the logical disposition of the problem and the conception of the fundamental principles more than in anything else. The effective development of all programs and the particular deduction and researches in law led necessarily to this: that the ideological needs, which we have considered and made into a principle, have a great weight even if they are given no recognition in methodic declarations. This is not surprising. Science cannot succeed with the recognition of the objectivity of concepts; every scientific activity is inevitably based on a system of ideal values, as a principle for the determination of the facts within its field. And whoever denies the priority of logical forms in his program is inconsequent in his development of them, or is discredited in their application. This is so fundamental an error (the

belief of obtaining the concept of law from the data of experience), that it does not belong to the students of positive law alone but to certain philosophers as well, who, from a false idea of the science, invert the natural sequence of its principles. This statement may prevent the confusion of the positive or historical science of law (which is entirely legitimate as a science) with that historicism which heralds itself as philosophy. Our criticism is directed only against the latter. Its conclusions, which tend to affirm the necessity of the logical form of law as the universal quality in all examples of juridical experience, respond to the legitimate needs of the positive science of law better than the systems which assume such data (the object of this science) from its underlying principle, thus depriving it of the base which it logically needs and confining it to an endless circle of inconsequences. If science in general is possible only when based on conceptual forms (and Trendelenburg was right in writing, 'in science you cannot legitimately lack a concept"),[1] it is much more true of jurisprudence, which by its peculiar nature is constantly called upon to co-ordinate, systematize and weigh separate facts according to universal logical principles.[2] Abstraction is a logical process more familiar

[1] "Die Definition des Rechts," p. 85.

[2] Hence it is that a certain philosophical quality is not foreign to the mental habit of a true jurist, as was shown by *Feuerbach*, "Ueber Philosophie und Empirie in ihrem Verhältnisse zur positiven Rechtswissenschaft" (Landshut, 1804), p. 49 et seq., and by *Stöckhardt*, "Die Wissenschaft des Rechtes oder das Naturrecht in Verbindung mit einer vergleichenden Kritik der positiven Rechtsideen" (Leipsic, 1825), Preface. The words of *Ulpian* on this question are well known (Dig. I, 1, i.). For the philosophical elements in the juridical doctrines of the Romans, see *Sokolowski*, "Die Philosophie im Privatrecht" (Halle, 1902). On the other hand, the empiricist's diffidence towards what *Comte* calls "the eminently metaphysical

to jurists than to any other class of scientists;[3] the dogmatics of law do not advance regularly except through the analysis of the concepts in their formal element.[4]

class of jurisconsult" is significant. On the logical activities of jurists, see *Trendelenburg*, "Naturrecht," §§ 71–83; *Arnold*, "Cultur und Rechtsleben," Bk. II, Cap. III; *Gierke*, "Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien" (Tübingen, 1874); p. 5 et seq.; *Rümelin*, "Juristiche Begriffsbildung" (Leipsic, 1878); *Schein*, "Unsere Rechtsphilosophie und Jurisprudenz" (Berlin, 1889), II Theil; *Wundt*, "Logik," II Bd., II Abth., p. 559 et seq., p. 577 et seq.; *Eltzbacher*, "Ueber Rechtsbegriffe," (Berlin, 1900).

[3] Here arises a danger of the abuse of abstraction in jurisprudence (Cf. *Gierke* and *Schein*, loc. cit. in n. 2, p. 109, supra) and the need of equity as a corrective. See *Lasson*, "System der Rechtsphilosophie," §§ 25, 40. Cf. *Miceli*, "Sul principio di equità" (Prato, 1904).

[4] *Pachmann*, "Ueber die gegenwärtige Bewegung in der Rechtswissenschaft" (Berlin, 1882), p. 40 et seq., has clearly distinguished these special and quasi-technical needs of the juridical from those of the economico-social sciences. The relativity of the two sciences has been so emphasized as to produce a deplorable confusion to the special harm of jurisprudence. Neither *Lor. v. Stein* nor *Ihering*, the principal founders of the sociological reform of jurisprudence, have been able to avoid this confusion. *Lor. v. Stein*, for example, begins a mistaken course in a fundamental concept, affirming that the science of law is the science of the forces which cause law. "Gegenwart und Zukunft der Rechts und Staatswissenschaft Deutschlands," p. vii; cf. p. 12, 116 et seq., 132 et seq. See *Pachmann*, contra, loc. cit., supra. Ihering's many exaggerated statements about the end and interest of law are well known (cf. Part II, Chap. VI, post). We must remember, too, that at an earlier date an exclusive consideration of the content of law led to the denial of jurisprudence as a science. Vide *Kirchmann*, "Die Werthlosigkeit der Jurisprudenz als Wissenschaft" (Berlin, 1848). The arguments advanced in support of this thesis are reducible to an exaggerated twisting of the doctrines of the historical school. Against the opinion of Kirchmann, vide *Retslag*, "Apologie der Jurisprudenz" (Berlin, 1848); *Stahl*, "Rechtswissenschaft oder Volksbewusstsein?" (Berlin, 1848). Cf. also, *Kuntze*, "Der Wendepunkt der Rechtswissenschaft" (Leipsic, 1856). The scientific necessity of abstracting the formal phase of law from the economic or social

§ 79. *Philosophy of Law.* While all the principal juridical concepts were subjected to rigorous analysis by this method, the fundamental concept of law itself was almost forgotten.[5] The reason for this lay in the fact that the analysis of the concept of law is a problem of an essentially philosophical nature and requires elements not at the disposal of the positive science of law. Jurists, therefore (more mindful here than elsewhere of the sentence "omnis definitio in jure periculosa"), are wont merely to touch upon such analysis and do not attempt accurate definition,[6] while philosophers have considered law according to their ideals, and have thus injected into their determination of its concept principles and postulates which should have been kept distinct.

§ 80. *"Allgemeine Rechtslehre" and the "Analytical School."* The need of a formal analysis of the concept of law has not been felt of late years. This is especially true of Germany, where, obeying an internal necessity of the several juridical sciences (those of penal, ecclesiastical, or constitutional law), a school has been formed to construct a general theory of law ("allgemeine Rechtslehre") by a critical revision of the elements common to the different branches of jurisprudence.[7]

phase in general has been clearly shown in our day by the excellent works of Simmel and Stammler, also by the critics of the "allgemeine Rechtslehre," which we will treat in § 81, post.

[5] "It is certainly strange that jurists who have determined so many formal concepts — of contract, servitude, wills, forfeitures and penalties — have studied the chief concept, that of law, only in its concrete and not in its formal force." *Lotmar*, "Der unmoralische Vertrag" (Leipsic, 1896), p. 2.

[6] Cf. Cap. I, p. 1, ante, and *Rümelin*, "Eine Definition des Rechts," p. 318 et seq.

[7] *Merkel*, at the head of this school, has tried to give its programme a philosophical basis. Vide his article "Ueber das Verhältnis der Rechtsphilosophie zur 'positiven' Rechtswissenschaft

This school (analogous in many respects to the English "Analytical School of Jurisprudence")[8] has been successful in explaining not a few points in dogma by emphasizing certain of the less well defined parts of the science. But, in regard to the fundamental problem of the logical nature of law, it clearly shows the vice latent in its origin — the lack of a philosophical base. The jurists of the "allgemeine Rechtslehre" show a lack of knowledge of the problem before them in their treatment of the concept of law, and limit it in various ways looking to the particular purpose of their study. Exclusively interested in systematizing positive law, they have generally given this phrase its most restricted meaning as that existing in a certain place at a certain time.[9]

und zum allgemeinen Theil derselben" and his other works included in the posthumous edition "Fragmente zur Sozialwissenschaft" and "Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts," Vol. III (Strassburg, 1898–99), and especially "Elemente der allgemeinen Rechtslehre" published in "Encyklopädie der Rechtswissenschaft" of Holtzendorff, 5 ed. (Leipsic, 1890), republished in "Gesammelte Abhandlungen," Zw. Hälfte (Strassburg, 1889); cf. also his excellent "Juristische Encyklopädie," 3 ed. (Berlin, 1904). The other most noteworthy works of this school are *Binding*, "Die Normen und ihre Uebertretung" (Leipsic), I Bd., 2 ed., 1890; II Bd. 1877; *Bierling*, "Zur Kritik der juristischen Grundbegriffe" (Gotha, 1877–83); "Juristische Prinzipienlehre" (Freiburg, 1894–98); *Thon*, "Rechtsnorm und subjectives Recht" (Weimar, 1878). Cf. *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," p. 25 et seq., p. 94 et seq.

[8] For the teaching of this school, see especially *Austin*, "Lectures on Jurisprudence as the Philosophy of Positive Law." Cf., for the other authors of this school, *Bergbohm*, "Jurisprudenz und Rechtsphilosophie," p. 12 et seq.; *Vanni*, "Maine," p. 36 et seq.

[9] *Fragapane* was right in saying that "the expression, positive law, considered as opposed to the other classical phrase, natural law, cannot have the same meaning for a lawyer that it has for a philosopher or truly cultured jurist. For the philosopher, positive law is the law which has enjoyed a concrete existence in some

They do not attempt a universal synthesis, but only an empirical collection or generalization restricted to certain data of a transitory historical period, or of a special matter.[10] Such limitation can be consonant with the immediate and particular ends of certain juridical sciences but not with a philosophy of law, even if it be understood in a positive sense.

§ 81. *Criticism of "Allgemeine Rechtslehre."* In this respect the criticisms made by Petrone against "the degradation of phenomenology in dogmatics and juridical logic" are fully justified. He has correctly pointed out that what the "allgemeine Rechtslehre" has called a concept is usually only a generic formula or sign of a number of particular things, and not the idea of a

place at some time, while for the lawyer, positive law is actual existing law. . . ." "Della Filosofia giuridica nel presente ordinamento degli studi," p. 33. Cf. *Del Vecchio*, "Positive Right" (in Law Magazine and Review, May 1913).

[10] *Thon* confesses this in his preface to "Rechtsnorm und subjectives Recht," p. vi (which is one of the best works of its kind), "I will take no care to show that the said concept within the boundaries which I have fixed is always reflected in the Roman comprehension of law. What I attempt . . . is only that the phenomena of our modern life enforce the conception of law of the kind, which I seek." "Meine Arbeit gilt dem Rechte der Gegenwart." Other writers have used Roman law for the foundation of their study; still others have tried to generalize the juridical concepts of the "more advanced" nations. Cf. § 77, ante. Many have limited their study to private law; some, on the other hand, have dealt only with public law. Attempts have not been entirely lacking, however, in the bosom of the "allgemeine Rechtslehre" itself, to define the fundamental concept in a more comprehensive and systematic manner, with regard to purely formal elements. Vide *Bierling*, "Juristische Prinzipienlehre," esp. Bd. I, Intro. Cf. among others, who do not properly belong to the school, *Schuppe*, "Grundzüge der Ethik und Rechtsphilosophie" (Breslau, 1881); "Der Begriff des subjektiven Rechts" (Breslau, 1887); *Stammler*, "Wirtschaft und Recht"; "Die Theorie des Anarchismus" (Berlin, 1894); "Die Lehre vom dem richtigen Rechte" (Berlin, 1902).

substance common to them and belonging objectively to all the species.[11] Terminology should not be allowed to lead us into error here. No word is understood in so many ways as the word form.[12] Even in law the distinction between formal and material elements is far from clear.[13] Rarely is this distinction made with a full sense of its significance and consequences; rarely, in other words, is it based on a true critique of knowledge. This critique shows, as we have said before,[14] that the form cannot be obtained from the material, for it is objectively and subjectively its condition. It follows that the formal concept of law cannot be

[11] Vide *Petrone*, "La fase recentissima della Filosofia del diritto in Germania," p. 139 et seq.; cf. p. 21 et seq.

[12] Cf. *Cohen*, "Kant's Begründung der Aesthetik" (Berlin, 1889), p. 233 et seq.

[13] Departing from the special applications of the distinction between matter and form (for example, in the theory of laws) in modern law, we may note that the formal unity of the concept of law, in contradistinction to the variety of its content, is often recognized even by followers of pure phenomenism. For example, *Tarde*, in "Les transformations du droit," p. 13, writes, "The idea of law, no matter how different its content, is formally the same in all places and ages." So *Bergbohm* admits that "purely formally, the idea of law is always and everywhere the same," and he distinguishes between the content ("Rechtsinhalt") and the form of law ("Rechtsform"). "Jurisprudenz und Rechtsphilosophie," pp. 73 et seq., 543 et seq. *Ihering* distinguishes the form of law from the content, meaning the simple external signs by form. Vide "Der Zweck im Recht," I Bd., p. 435 et seq. In this sense *Cogliolo* states that "law is a form which can cover divers contents." "Saggi sopra l'evoluzione del diritto privato" (Turin, 1885), p. 12; cf. "Filosofia del diritto privato," 2 ed. (Florence, 1891), p. 27 et seq. *Lor. v. Stein* in "Gegenwart und Zukunft der Rechts und Staatswissenschaft Deutschlands," p. 88 et seq., speaks of the concept of law's twofold content, part changeable, part eternal. The distinction, which is not developed with sufficient clearness, corresponds, however, in the last analysis to that between formal and material elements of law.

[14] Cf. § 59, ante.

coherently held except by those who admit the priority and metaphysical nature of concepts.[15] All who have

[15] *Miraglia* expresses himself clearly on this point. "The idea of law is not reducible to a simple mental sum of definite and distinct actual properties. There is in it, as in every universal idea, a series of necessary elements and relations, that bare experience cannot furnish, because it is by nature contingent and particular." "Filosofia del diritto," Vol. I, p. 208. *Filomusi-Guelfi*, in "Del concetto del diritto natur.," p. 39 et seq., and in "Enciclopedia giuridica," p. 36 et seq., 50, 122, teaches with great insight that the idea of law is not exhausted in experience, that is, in positive law, of whose formation it is a presupposition. It is remarkable that *Ardigò*, although starting from different principles, admits that over and above positive law there is an infinite natural or potential law. "Infinite in the sense that it is a power interminable in its series and forms of development. An indistinct power fitted for self-determination in distinct facts of law, which are realized constantly and endlessly, as natural facts in general are realized by nature's inexhaustible force." "Sociologia" in "Opere filosofiche" (Padua, 1897), Vol. IV, p. 174. Cf. "La Morale dei positivisti," "Op. filos.," Lib. II, Part. III, Cap. I.

*Lasson* has shown and explained the necessity of considering law in its conceptual form as well as in its manifold historical content. "In the variety of the phenomenal, which, measured according to the standard of the actual by all historical proofs still has in itself the element of chance, it is necessary to distinguish the contingent from the essential. We must find what is common in the endless differences in the history of legal forms and note the common frame in all the thousand variations and abnormalities of law. Then even the most out of the way and unusual legal forms will still fall within the field of law and will be included among the essentials of the concept of law." "System der Rechtsphilosophie," p. 415; vide, also, p. 195. He assigned to philosophy of law the duty of determining the concept of law which should be an Ariadne's thread in the labyrinth of positive juridical decisions (p. 415). Philosophy of law, has, therefore, its beginning in the idea of law (p. 19). After such a statement we can but marvel that Lasson states in another place that the concept of law can be gathered from mere experience. "Our beginning lies in empirical data" (p. 193). The contradiction is explained by a reference to Hegelian dialectics, which inspired Lasson. They hold that the idea and historical fact substantially coincide, and the phenomenal reality of law cannot get away from the idea, which

to-day undertaken the philosophical restoration of law as opposed to the fallacious doctrines of empiricism have more or less firmly made such an admission. This kind of critique is closely connected with the "return to Kant," which is one of the characteristic notes of modern thought and which would be even more fruitful if Kantian thought were always properly understood and developed.

§ 82. *Form and Content Constitute a Unit.* The recognition of the objectivity and logical priority of the form signifies the acceptance of the fundamental methodic condition for the theory of law in general. Certainly this theory has other objects besides the determination of the formal elements. The notion of the form must be made integral by that of the content, which in its turn demands a two-fold study, empirical and speculative, for the content of law can be empirical or rational (positive or not positive). So the elaboration of the content of law belongs in part to philosophy and in part to juridical science, while the study of the form, which is applied in both branches and constitutes their common basis, is the exclusive object of philosophy. The logical synthesis of potential experience has, however, its primary and necessary complement in the actual analysis of experience. The historical development of law can neither be deduced from nor explained by its form alone. To be fully understood, this development must be studied not only in its immanent aspect and in its

is immanent in it. Experience here conveys a special meaning, equally different from the Kantian and the positive sense, rendering it possible to invoke it as a principle, merely affirming the absolute objectivity of the idea, which is expressed by it. The fundamental demand, which we have shown above, is however, here too, much more respected than it may seem from some aspects of the doctrine. But the dangers of the confusion of two terms, one superior to the other cannot be hidden.

very identity and continuity but also in its divers concrete coefficients and the effective causes of its various phases. If the purely logical determination of form necessarily remains distinct, it would be unjust not to admit its importance, and entirely erroneous, in order to remedy its supposed defect, to confuse it with studies of a different object and nature. More should not be asked of a principle than it can give. The determination of content should not be sought in that of form. This distinction between the two principles does not lessen but insures their respective values. The formal concept of law cannot be called a sterile truth because it does not imply "per se" some concrete legal proposition. If it did it would lose its universality and cease to be formal. The study of form is sterile when it is understood as a denial of that of content; that is, when in place of distinguishing the two studies, one is sacrificed to the other. But, understood in the proper sense, formal determination not only does not hinder the pursuit (either ideal or empirical) of content, but aids it and defines the presupposition upon which it would otherwise be *unknowingly* based. The study of form would be sterile and empty, however, if it were reducible to a simple nominalistic abstraction or an arbitrary generalization without an objective correspondence.[16] If there were no other possibility, every analysis or conceptual elaboration would lose all value in reality. But criticism dissolves and dissipates this fallacy of ancient and modern scepticism and shows that form is the very essence of the object. Thought, therefore, in referring to pure form, deals with essence.[17]

[16] The doctrines of *Taine* should be recalled in this regard. "De l'intelligence," 4th ed. (Paris, 1883); cf. *Ribot*, "L'évolution des idées générales" (Paris, 1897).

[17] In popular language form and substance are opposite terms, considering the first as a synonym of accidental or external appear-

We are far from believing in formalism, the myopic and barren cult of extrinsic element, to the harm of the real substratum. When we speak of form, we mean the "forma substantialis": the substance of law is what its formal concept shows.[18] This substance is, of course, neither visible nor tangible, but it is no less real for the lack of such qualities. Like every universal concept, it is evidenced in reality by an indefinite series of distinct examples, and is reduced to unity only in the supreme degree of our knowledge or in pure reason.[19]

ance. In philosophical terminology, on the other hand, as we have said (cf. Cap. VIII, p. 68, ante) form connotes substance and is opposed to content, which means the phase of mutability and growth.

[18] Here we must remember the distinction between nominalistic and realistic definition shown by *Aristotle*, "Anal. Post.," II, 7, 92 b; II, 10, 94 a, fully developed by the Scholiasts, and then given various meanings by modern philosophy. Vide, "Vocabulaire technique et critique de la philosophie" in "Bulletin de la société française de philosophie" (Paris, 1904), voc. "Définition." The realistic definition ("quid rei"), also called to-day, essential, has reference to the intrinsic nature of the object and attempts to explain its possibility of existence. Cf. *Kant*, "Krit. d. rein. Vernunft," (ed. Hartenstein) p. 228 n. and esp. p. 523 et seq. ("Transcendentale Methodenlehre," I Hauptst., I Abschn.)

[19] The consequence of this is that the reality of the universals is necessarily hidden from him who trusts entirely to the senses. In this way, *De Maistre*, relying on an old sophism, denies the existence of man in general. "The Constitution of 1795, like all its elder brothers, is made for man. Now, man does not exist in the world. I have seen, in my life, Spaniards, Italians and Russians, and I even know, thanks to Montesquieu, that there are Persians, but as to man, I declare that I have never come across one in my life; if he exists, I don't know it." "Considérations sur la France," Cap. VI. It is not difficult to reply to this nominalism, which hides superficiality of thought in cleverness of phrase, that without the universal concept of man it would not be possible to recognize that Spaniards, Italians and Russians are all men. *Bluntschli* wisely points out,

§ 83. *Criticism of Hegelianism and "gestaltende Macht."* If the mistake is made on one hand of depriving the concept of law of its quality of principle, until it is left but little more than an empty phrase, it is equally wrong to attribute elements and properties to it which do not belong to it, until it is confused with principles of an entirely different order. And in this latter case a critical revision is necessary, because the exaggerations of metaphysics, by provoking reactions from empirical phenomenism, lend it an appearance of legitimacy. In conformity with the general principles which we have laid down,[20] we must firstly do away with the equivocation which places an active power, "gestaltende Macht," within the concept of law. This is a cardinal point in the hypothesis of Hegelianism, which tried to establish the relation between thought and reality, and subject

"If science should not first know the one common basis of all nationalities, the nature of man, then she never could understand the simply modified nature of a people." "Die neueren Rechtsschulen der deutschen Juristen," p. 63. Similar observations can be found in *Eberty*, "Versuche auf dem Gebiete des Naturrechts" (Leipsic, 1852), Pt. I, and in *Schuppe*, "Die Methoden der Rechtsphilosophie," p. 232. We must remember that the capacity of the senses is more limited than that of reason. "To establish gratuitously the principle that what our sense cannot imagine our reason cannot grasp, and from this gratuitous anticipation to derive that, therefore, universal and abstract ideas do not exist, is a false method, it is starting with a prejudice, subverting facts to it, dictating law to nature instead of sagaciously understanding and interpreting it." *Rosmini*, "Nuovo saggio sull' origine delle idee," 6th ed. (Intra, 1875-7), Sec. V, § 401. "It is not sense," *Bruno* taught, "which sees the infinite . . . and whoever tries to grasp the infinite through his senses is like a man who tries to discover substance and essence with his eyes, and denies what he cannot see, or denies the very substance and essence of objects which he does see." "De l'infinito universo e mondi," Did. I. The germ of this doctrine can be found in Plato. Cf. §§ 52, 66, ante.

[20] Cf., § 56, ante.

and object, not by the royal road of criticism, so masterfully shown by Kant (in the second preface to his "Kritik der reinen Vernunft") but by a simply dogmatic identification of the antithetic terms. Hegelian idealism, in alternate sentences (as Petrone said)[21] assigning the immanence and eternity of being to phenomena and the mobility and contingency of phenomena to being, fused both ideas into a single principle which is, or would be, both at the same time. Consequently, in Hegelian doctrine, the concept of law would be the cause of the reality of law, the generating motive of its existence in the empirical world.[22]

§ 84. *Distinction of Logical and Real Determination.* To distinguish the logical from the real determination is, however, one of the elementary canons of criticism. What is logically true may not be existent but only possible.[23] So the formal concept of law denotes the simple possibility of its existence, and would exist even if, as Rosmini held, the conditions of its real experience were lacking.[24] The conclusion is that reality cannot be guessed from the concept, nor can the former

[21] "La fase recentissima della Filosofia del diritto in Germania," p. 8.

[22] Vide *Hegel*, "Grundlinien der Philosophie des Rechts," Intro. et passim. Cf., also, *Lasson*, "System der Rechtsphilosophie," where there is a complete and sympathetic reconstruction of Hegelian thought on this subject.

[23] For this principle, which was thoroughly developed by *Kant* (Cf. "Krit. d. rein. Vernunft," p. 436 et seq.), see *Rosmini*, "Nuovo saggio sull' origine delle idee," Sec. V, §§ 402–8.

[24] "We exclude from the idea of law in general, not only the concept of society, but also that of actual coexistence—possible existence is enough for us. We believe that the idea of law would exist if there were but one single individual of the human race, because he could consider himself in a hypothetical relation with some fellow beings." *Rosmini*, "Filosofia del diritto," 2d ed. (Intra, 1865), Vol. I, p. 146, n. *Leibnis* reasoned analogously: "Doctrina

be considered as an effect of the latter. There is no causal relation between them; neither one is the cause or effect of the other. In order that law may enter empirical reality, and take on a body as a phenomenon, it has need of an efficient force or sufficient historical motive. The plurality and complexity of such forces and motives are what produce and explain the diversity of the content of the law.[25] To attribute to the formal concept, which constitutes the conditions of the identity of law, the genesis of the content, which is various, is to make the concept self-contradictory, and inexplicable.

§ 85. *Concept and Ideal of Law.* Undue confusion arises also on another point concerning the formal determination of law, and demands an explanation, fortunately one easily deducible from our conclusion already established. The concept of law is confused with its ideal, in other words, the reason, which should constitute its content, is substituted for its logical form.

juris ex eorum numero est quæ non ab experimentis sed definitionibus nec a sensuum sed rationis demonstrationibus pendent et sunt ut ita dicam juris non facti. Cum enim consistat justitia in congruitate ac proportionalitate quadam, potest intellegi justum aliquid esse, etsi nec sit qui justitiam exerceat nec in quem exerceatur, prorsus ut numerorum rationes veræ sunt, etsi non sit nec qui numeret nec quod numeretur." "Juris et Æqui Elementa," edit. by *Mollat*, "Rechtsphilosophisches aus Leibnizens ungedruckten Schriften" (Leipsic, 1865), p. 24.

[25] "The content of law," so writes *Bergbohm*, "is determined by so many forces, that it is never complete nor can it be condensed in an exhaustive universal category. The rubrics of moral conviction and religious belief, of the underlying bases of human nature and of political purposes, of necessity and reason, of security against the abuse of power, and of provision against human frailty, even doubled and tripled, fall far from including the sum of motives by which men in reality have given and will give other content to law." "Jurisprudenz und Rechtsphilosophie," I, p. 544.

Consequently, many so-called definitions of law correspond only to a certain particular system or conception of the purposes of law, and are far from containing (as a true definition should) the essential points common to all possible examples of the object. All the ideals of proportion, protection, liberty and well-being, which the human mind has always affirmed in respect to law, are transformed by the various philosophers into so many definitions of law.[26] It is evident that in taking such action these philosophers have not regarded law purely and simply, but its intrinsic foundation, the principle of its justification, and the duty it is called upon to fulfill. This branch of study is, of course, legitimate and necessary. But it presupposes the intuition of the logical form of law, since its object is to assign it a definite content, answering one purpose, perhaps the most rational.[27] The concept of law (to be true to pure form), however, must be, as we have seen, indifferent and neutral to all juridical principles whatever they are, and not identify

[26] Cf., in proof of this, *Baumstark*, "Was ist das Recht?" (Mannheim, 1874); *Rümelin*, "Eine Definition des Rechts"; *Trendelenburg*, "Die Definition des Rechts," in which many of the most celebrated philosophical definitions of law are cited.

[27] This observation is applicable also to those determinations of law which, in enunciating a maxim or ideal principle, are intended to regulate in a certain way the intent or will, and in this sense are called formal. In fact, however, such determinations restrict or specify the content of law in some way, and do not comprehend all its possible guises. This, the Kantian formula that law is "the sum of conditions, in which the free will of one restricts the free will of his fellow only so far as is necessary for the universal existence of freedom" (in "Met. Anfangsgr. d. Rechtslehre," p. xxxiii), is not a definition in a strict sense (cf. *Ueberweg*, "System der Logik," §§ 60–62), but a rational principle which had the value of an ideal in Kant's mind. All cases of juridical reality are excluded by such a definition in which the law of equal liberty is not actualized. It is a deontological or antonomastic definition. Cf. § 57, ante.

itself even with the one which on an internal scale is shown to be the highest and best. A correspondence to the formal concept takes place always when a juridical proposition or principle is given, whether it is positive or not, whether it approximates the ideal or not.[28] The definition of a genus by its highest species gives a "denominatio a posteriori," which is logically a true "fallacia fictæ universalitatis," that is, a denial of the connotation of the whole genus.

§ 86. *Correspondence of Positive Law to the Ends of Social Life.* This was the error of old juridical speculation, which failed to make a full analysis of the formal characteristics of law, and it arises again in a modern guise when the correspondence of positive law to the ends of social life is asserted "a priori." This method, which leads to such teleological definitions as Ihering's, covers a confusion between the logical concept and

[28] According to the doctrine of *Lasson* ("System der Rechtsphilosophie," p. 415), the ideal, on the contrary, should be what most corresponds to the concept. We cannot agree with *Rümelin* ("Eine Definition des Rechts," p. 324) in saying that a definition of law should not consider equally the laws of different peoples, but should offer a test, by separating what deserves the name of law from what does not. Even *Trendelenburg* ("Die Definition des Rechts," p. 87) understands the definition as a test to weigh law. We can but repeat our earlier arguments against this. Cf. *Bierling*, "Zur Kritik der juristischen Grundbegriffe," 1 Th., p. 163 et seq.; *Wallaschek*, "Studien zur Rechtsphilosophie," p. 96 et seq.; who, as most writers of the "allgemeine Rechtslehre," err chiefly in excluding non-positive law from their concept.

The distinction between concept and idea was observed and used in respect to the State by *Bluntschli*, "Allgemeine Staatslehre," p. 14. *Jellinek* has an analogous doctrine and contradistinguishes the "idealer Typus" from the "Durchschnittstypus." Vide "Das Recht des modernen Staats," Vol. I, "Allgemeine Staatslehre" (Berlin, 1900), p. 31 et seq.

ethical exigency, as we have shown.[29] To say that law "assures conditions of social existence or development," or some like thing, is to state an exigency in respect to law which it will be able to fulfill more or less perfectly, but which is certainly not its logical definition. A juridical proposition does not cease to be juridical because it does not promote happiness. This "præsumtio juris et de jure," that positive law is always equal to its rational motive, is in substance a way of escaping the true and proper deontologic problem by an inaccurate optimistic generalization of experience.[30] An adoration of facts has superseded that of ideas in our day. The new dogmatism is no better than the old. As the idea of law used to be modelled according to a purely ideal type even in antithesis to reality, so now an attempt is being made to determine it by some example or

[29] Cf. § 57, ante.

[30] It is true that Ihering, with Vanni and others, are wont so to insist upon the relativity of the concepts of "social utility" and "of the conditions of existence" as to free themselves almost from this criticism. See *Ihering*, "Der Zweck im Recht," I Bd., p. 433 et seq.; *Vanni*, "Maine," p. 44 et seq.; "Filosofia del diritto," p. 53 et seq. No matter how varying and ambiguous such concepts are made, even until their objective significance is destroyed, the equivocation we complain of remains. In the first place, it cannot be admitted that the formation of juridical institutions is constantly determined by what is or is supposed to be the most useful to society (for special interests can prevail); in the second place, it can be shown that the motives and ends of law are not law itself. To the variety of historical ends and motives corresponds, as we have said above, the variety of content, while the unity of form remains. Vanni has elsewhere recognized that the logical concept and ethical exigency of law are objects of two studies. See "La Filosofia del diritto in Germania e la ricerca positiva," in "Riv. ital. per le sci. giur.," Vol. XXII (1896), p. 90; "Il diritto nella totalità dei suoi rapporti e la ricerca oggettiva" (Rome, 1900), in "Rivista italiana di Sociologia," Anno IV, Fasc. I, p. 9; "Lezioni," p. 61.

motive not essential to reality itself, which is insufficient for the expression of its universal nature. Criticism has shown that the essence of law is constituted by pure form alone, which appears in reason as concept, and is distinguished as such from content, which may be empirical or transcendental. This demonstration lays the basis of subsequent research and by marking its limits assures its legitimacy.

# PART II

## THE CONCEPT OF LAW

## CHAPTER I

### HUMAN ACTS ARE SUBJECT TO JURIDICAL CRITERIA

JURIDICAL CRITERIA APPLY TO ACTS. — ANALYSIS OF ACTS. — NON-APPLICABILITY OF JURIDICAL CRITERION BECAUSE OF A DEFICIENCY OF THE PHYSICAL OR PSYCHICAL ELEMENT.

§ 87. *The Juridical Criterion.* The psychological fact upon which this inquiry is based is the perception of right and wrong, that is, the process of reason by which we determine the quality of justice or injustice, right or wrong, conformity or non-conformity to law.[1] A question is juridical if it furnishes material for a judgment of this kind.[2] We are about to consider the logical value and

[1] "To distinguish the just from the unjust" is the original logical operation to which both the spontaneous manifestations of every mind and the technical elaborations of writers and interpreters of law are reducible; "Justitiam namque colimus .... æquum ab iniquo separantes, licitum ab illicito discernentes," to quote the words of Ulpian, speaking of the works of the jurisconsults (Dig. I, 1, i). Jurisprudence, in the broadest sense is defined as the science of the just and the unjust, Dig. I, 1, x.

[2] With regard to this fundamental idea, Seneca defined law as "justi et injusti regula" ("De Beneficiis," IV, 12), which definition (found also in the passage of Chrysippus, cited in Dig. I, 3, ii, where law is called κανὼν δικαίων καὶ ἀδίκων) is applicable to every kind of

significance of this criterion, and with this in view we will first consider to what objects it can be applied.

§ 88. *The Juridical Criterion Applies to Acts.* Justice is not a universal criterion; all nature cannot be weighed juridically. Physical facts have no relation to justice. This does not denote that they are ignored by law, but only that they are not, of themselves, objects of possible juridical judgments. A phenomenon cannot be legal or illegal except in reference to subjective will. Only those acts (using the word in its widest sense) which show a subjective element[3] can be juridically weighed. It is well here to note, however, that negative factors play an important part in the general concept of action.[4]

§ 89. *Analysis of Acts of which Conduct Consists.* Admitting, as all do without question, that the juridical criterion is applicable to acts alone and that only acts can be treated as conforming or not conforming to law, the question of the extent of its applicability arises: Is it applicable to all acts or only to those of a certain kind or class? In order to answer this question we must consider the essential elements of action, and see if the

juridical norm and proposition, whether expressed in the form of a law or not. We may add that a juridical criterion can be contained in several propositions. In the latter case they are logically joined and should be treated as forming a single whole. This is more clearly shown by the theory of juridical norms and their classification. Cf. § 93, post.

[3] *Schmalz* gives a more accurate definition, "Action is a change in essence, brought about by its proper energy." "Die Wissenschaft des natürlichen Rechts" (Leipsic, 1831), p. 14.

[4] Given an agent, abstention is not a simple non-happening, but an element characteristic of action and thus has within it a positive quality. To quote *Rosmini*, "Subjective control over action gives the determination to omit an act, which could alter or disturb ethical relation; whence, *a virtual exercise of will may be found in apparent inaction.*" "Filosofia del diritto," Vol. I, p. 132.

distinctions and limitations which exclude a large part of human conduct from the jurisdiction of law are well founded. Two elements are needed to constitute action: the subjective will and its extrinsification or objective manifestation.[5] The first coefficient is of the psychic order, the second of the physical. John Stuart Mill goes so far as to say that, "An act is not one thing, but a series of two things, the state of mind called volition, followed by an effect. The volition or intention to produce the effect is one thing; the effect produced, in consequence of the intention, is another thing; the two together constitute the action."[6] Mill in this instance, perhaps for the sake of clearness, represents one thing as two. The relation between the psychic and physical elements is not one of simple succession. They interpenetrate; and the act is the result of their interpenetration. An act does not consist in two things or two objectively distinct entities. It is one *thing*, but its unity has a double aspect, being at the same time a fact of nature and of will.[7] There cannot be an act

[5] Cf. *Bierling*, "Juristische Prinzipienlehre," II Bd., p. 47. Vide also *Vanni*, "Lezioni," p. 115.

[6] *J. Stuart Mill*, "A System of Logic," Vol. I, p. 59.

[7] *Schopenhauer* gives the subject deep consideration in "Die Welt als Wille und Vorstellung," § 18. "Acts of will and physical acts are not two distinct things joined in a causal chain; they do not stand in a relation of cause and effect, but are one and the same, except that one is immediate and the other is extrinsic. Physical action is nothing more than the objectivation of will action." There is a substantial unity and primary relation between a man's will and his acts, which cannot be resolved into the relation of cause and effect: provided we do not conceive of the causal relation as analogous to our concept of action or by the application of the latter. To hold the relation of the will to its acts as causal is equivalent to saying that will acts upon its acts, which is arguing in a circle, like all "ignotum per ignotius" arguments. *Galluppi* saw this and said, "We must regard acts or the efficiency of the agent as simple

without a phenomenon, because an act is a relation which presupposes an objective and concrete element. But a phenomenon is not an act unless it has a subjective factor, and represents a movement of will.

§ 90. *No Distinction between External and Internal Acts.* The popular division of acts into external and internal has, therefore, no real value. Every act is both external and internal, because without psychic content a phenomenon cannot be attributed to an agent and is not, therefore, an act; and, without extrinsification a movement of will cannot be an act, because nothing, even in the psychic order, can exist in fact without correlation or a point of tangency with the external world. So, whatever the peculiarities which distinguish one kind or class of acts from another, the difference cannot lie in the complete lack of either the psychical or physical element; for, on such an hypothesis, the definition would not be met and the class, thus defined, would constitute a "contradictio in adjecto." The question of the applicability of law is involved in this, for it is clear that the application of a juridical criterion cannot be extended to acts, described "sic et simpliciter" as internal or external, since the criterion must find both elements in every act.

§ 91. *Two Current Theories of the Limits of the Application of the Juridical Criterion to Acts.* Looking at the two current theories on this subject, we find the scope of law restricted because of a deficiency of one or the other of the above elements. There are acts which, either by a deficiency of the psychic (internal) coefficient or of the physical (external) coefficient, are said

and indefinable," since otherwise we must admit an "act of acting" and so on "ad infinitum," without knowing where to stop. "Filosofia della volontà," Part I, Cap. VI, § 68. [Cf., also, *Leibnis*, who spoke of the will to will, and so on, "ad infinitum." — *Tr.*]

to be without juridical value, that is, without legal significance. Let us examine separately the cases thus presented and consider the basis and weight of the points involved.

§ 92. *Non-Applicability of the Juridical Criterion because of a Deficiency of the Psychic Element.* The fact that law, in weighing acts, takes account of the degree of the perceptive and volitive power of the agent is such an elementary truth that we need not pause to prove it. The question before us here is whether or not a minimum of perception or will is enough to bring an act within the sphere of law; in other words, are there acts, which, because of deficiency of the psychic coefficient, cannot be subjected to juridical valuation? The generality of this proposition makes it usually a moral not a legal question. Perhaps it is on this account that jurists have disregarded it or introduced into it doctrines which need correction in legal application. Moralists divide acts into two classes, depending upon whether or not they are preceded by deliberation and accompanied by knowledge of their end. The first class consists in voluntary and imputable acts; the second in those which are involuntary and non-imputable. Some authorities, in order to emphasize the importance of this classification, exclude the entire second class from the category of acts.[8] Terminology matters little here

[8] "In the strict and philosophical sense of the word, a man's acts are those which he has conceived and willed. Such is the meaning given this term in morals, where no act is imputed except to a voluntary agent. But where there is no question of moral imputation the word takes on a broader meaning and many facts are called a man's acts, which he never conceived or willed. From this point of view, acts are divided into voluntary, involuntary and mixed." *Reid*, "Essays on the Intellectual Powers of Man," Essay III, Pt. 1, Cap. I. Hegel upheld this restrictive definition. "Grundlinien der Philosophie des Rechts," §§ 113–120. Cf. *Spa-*

as elsewhere, if the variance of usage is not the cause or effect of uncertainty and error. Absolutely involuntary acts do not exist, since acts, as we have said, are conceivable only in relation to will. The two concepts of will and act are essentially correlative. The latter implies the former. We can define will as the primary and irreducible principle of subjective being which develops in the world of the senses.[9] Its development

*venta*, "Studi sull' Etica di Hegel" (Naples, 1869), republished by G. Gentile under the title of "Principii di Etica" (Naples, 1904), Cap. IV, §§ 2–4. "Certainly all that can happen through the activity of an agent, every modification or change in external existence, if so understood can be his fact, a fact belonging to him. But all these facts are not acts of his. He recognizes and has the right to recognize as his only those results which he has known and willed — that he has intended" (p. 117).

An analogous conception lies in the older doctrine which distinguishes human acts from acts of man. *Thomas Aquinas* explains this distinction: "Actionum quæ ab homine aguntur illæ solæ proprie dicuntur ***humanæ*** quæ sunt propriæ hominis in quantum est homo. Differt autem homo ab aliis irrationalibus creaturis in hoc quod est suorum actuum dominus. Unde illæ solæ actiones vocantur propriæ ***humanæ*** quarum homo est dominus. Est autem homo dominus suorum actuum per rationem et voluntatem: unde et liberum arbitrium esse dicitur *facultas voluntatis et rationis*. Illæ ergo actiones proprie ***humanæ*** dicuntur quæ ex voluntate deliberata procedunt. Si quæ autem aliæ actiones homini conveniant, possunt dici quidem *hominis actiones* sed non proprie ***humanæ*** cum non sint hominis in quantum est homo." "Sum. Theol.," 1st, 2d, Quæst. 1, Art. I. This conception is the basis of *Puffendorf's* definition: "Per *humanam actionem* intelligimus non quemvis motum a facultatibus hominis procedentem; sed illum duntaxat, qui provenit ac dirigitur ab iis facultatibus quas humano generi præ brutis Creator O. M. attribuit; nempe *qui velut prælucente intellectu ac decernente voluntate suscipitur.*" "De Officio Hominis et Civis," Lib. I, Cap. I, §2; cf. "De Jure Naturæ et Gentium," Lib. I., Cap. V, §1. The Thomistic doctrine of human action can be still seen, for example, in the work of *Prisco*, "Metafisica della Morale" (Naples, 1865), p. 118 et seq.

[9] Ancient psychology treated will as a rational tendency towards the good and subordinate, therefore, to intellect. Vide *Thomas*

varies in form, because will changes with the degree of perception from the blindest instinct to the most deliberate knowledge. And yet its differences and distinctions rest on a substantial unity. Will, like life itself, is one and continuous in all its manifestations.[10]

§ 93. *Resistance as Action.* Personality and subjective will are revealed in definite extrinsifications. Conduct[11] is always imputable.[12] An exception to this

*Aquinas*, "Sum. Theol.," 1, Quæst. LIX, Art. I; 1st, Quæst. LXXXVII, Art. 4: "Actus voluntatis nihil aliud est quam inclinatio quædam consequens formam intellectam"; cf. 1st, 2d, Quæst. VI pr.; Quæst VIII, Art. I. So, too, was will defined by *Rosmini* as "the power which urges man to a known good" ("Antropologia in servigio della scienza morale," Lib. III, Sec. II, Cap. II), "or as the virtue which man has to cling to a known object," "Psicologia," Pt. II, Lib. II, Cap. X. This concept is generally abandoned by modern psychologists, who, far from admitting a precedence or predominance of intellect over will, tend to find in the latter the basic fact of all psychic phenomenology; and that, too, independently of the metaphysical thesis of voluntarism (*Schopenhauer*). Cf. *Villa*, "La Psicologia contemporanea" (Turin, 1899), Cap. V, particularly p. 441 et seq.

[10] This definition of will and its connection with the intellect is in accord with the principle of the unity of psychic processes, which is a fundamental precept of psychology, as we will see in its proper place, § 94, post.

[11] Conduct is the synthesis of activity at a given moment. It has many aspects which can be considered separately as acts, provided that they have sufficient characteristics to show a separate phase of will. This is the reason that facts of a physiological order, which man has in common with other beings of the organic world, representing, so to speak, the lower side of his nature (for example, respiration) are not generally considered as acts in the true sense. They are more accurately elements involved and developing in acts, and may, therefore, be included in the general connotation of activity. This definition solves a difficulty which has caused many errors and disputes.

[12] This concept of imputability, which is the broadest, is also the best, because everything is imputable to an agent, of which he

principle, however, is found in acts done under the influence of some extrinsic force or physical violence.[13] This exception must be carefully watched, however, as it often lies in appearance only. The passive subject of another's will does not act, but is the instrument or object of another's acts. His will is usually active in the opposite sense, as resistance. The fact that a man is subjected to violence does not constitute "per se" an act on the part of the victim, but is a negative factor or argument "a contrario" to show positively his actual conduct. In order to do this intelligently, we must weigh the quality and quantity of resistance.[14] Also in such case, therefore, the fundamental coherence of act and will is not lacking. A true exception to the general rule of imputability should be made, however, if we consider as involuntary every *unconscious* act. In fact, some schools hold that as will depends on knowledge, where the latter is lacking or defective there can be no will. But this thesis, a result of extreme intellectualism, is based on a false idea of will and does not bear analysis. It is not his act, but its consequences, that the agent's will does not embrace because of a lack or defect in his knowledge. The office of the practical mind is to foresee the effect of acts. Prescience of the effect gives the agent a knowledge of the value of the end, and thus extends his will and deliberation to it. Only when the end is clearly

is the author. Of the more restrictive meaning of imputability we treat below in the text.

[13] For the various possibilities of this kind, see the distinctions made by *Berner*, "Strafrecht," § 91.

[14] The case of moral violence is, of course, different, for, although it may lessen the significance of the act which it brings about, it does not prevent it being imputable to the agent, who effects it, that is, to him who "coactus voluit." Cf. *Green*, "Lectures on the Principles of Political Obligation" (London, 1901), p. 36.

perceived does an act show the fully developed personality and reflect the full rationality of the agent. And it is only under these conditions that an act is imputable in the strictest sense.[15] If knowledge of the end is lacking or in any way defective, the act suffers a loss psychologically, and, being less intimately connected with the agent, has less juridical value. This much is sure, but it must not blind us to the fact that acts, although to different degrees, always represent an extrinsification of subjective personality, that is, a movement of will sufficient to give them their specific character and distinguish them from purely objective facts of the physical order, thus rendering them susceptible to juridical valuation. The mistake which leads to the exclusion of acts improperly called involuntary, not only from law but from morals, is based upon

[15] This highest kind of imputability is employed when it is a question of punishment. The requisites of penal liability are determined by the peculiar nature of punishment. *Simmel* gives an accurate outline of this topic when he says that "an individual can be held responsible and liable when the punitive reaction of his deed affects him, whether it be corrective, deterrent or what not." "Einleitung in die Moralwissenschaft," II Bd., p. 213. Cf. the observations of *Merkel*, "Rechtliche Verantwortlichkeit" in "Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts" (Strassburg, 1899), especially at p. 889 et seq. From this comes the necessity of defining imputability in a particular way in penal science and legislation. Such need is remedied also by help of a system of gradations. Cf. *Filomusi-Guelfi*, "Delle condizioni che escludono o diminuiscono l'imputabilità" (Rome, 1875). This is, however, a clear proof of what it is of importance for us to note here, that penal imputability and liability form but a subdivision of imputability and liability in general. For the various spheres of liability in general, cf. *Lasson*, "Sittliche Verantwortlichkeit," in vol. "Zeitliches und Zeitloses" (Leipsic, 1890) p. 164 et seq. The distinctions of *Carrara* should too be remembered, "Programma del corso di diritto criminale," Parte Generale, Sec. 1, Cap. I, esp. § 8.

a hasty and false determination of the question, which fails to discover that an agent is the author of all his acts, although the fullness of his rational being is not exercised therein. "The actual control which an agent has over his own conduct" (to quote Rosmini) governs his omissions; and "a fortiori" his unconsidered acts, or those wherein knowledge is lacking, are imputable to him and susceptible of valuation. The psychological conditions of the agent naturally should be considered and calculated in judging acts from a juridical standpoint. Defects found can entirely alter the resultant judgment, but cannot destroy the logical possibility of the judgment itself. Thus, lack of intent, any of the many forms of mistake, immaturity, or deficiency of mind, and, in general, any psychic anomaly can produce or destroy particular legal results or normal effects. But such circumstances do not make an act indifferent to law; they do not prevent an act from being necessarily either in conformity or non-conformity to law. Some of these circumstances may destroy the punibility of an act which would normally be punishable, or avoid some of its effects in civil law. But we must note that punibility is only a consequence of an illegal act[16] and enforceability is only a consequence of a legal act. The latter remains legal (and not prohibitable) even if inefficient as a source of obligation.[17] And

[16] Cf. *Brugi*, "Istituzioni di diritto civile italiano" (Milan, 1905), § 26.

[17] It can be seen from this that civil liability has specific conditions which differentiate it from imputability and liability in general. In order to determine whether an act is juridical (either in conformity or non-conformity to law) we need only to connect it with an agent. In other words, the general concept of imputability is sufficient. But there are other requisites in order to subject an agent to a determinate obligation as a consequence of some legal or illegal act, which creates conditions of legal liability in the strict

conversely, an act which constitutes a crime remains contrary to law (and prohibitable), even if psychic infirmity protects its author from punishment. The juridical valuation remains in both cases.[18] In conclusion, on this point we may assert that, as no act can be absolutely external, so no act can, because of a failure of the psychic coefficient, be excluded from juridical consideration.

§ 94. *An Act Cannot Lack Extrinsification.* Let us now take up the limitation of the applicability of the juridical criterion because of a lack of the physical element, that is, because of the internal nature of some acts. According to a widespread theory (referable to Thomasius and Kant), acts developing entirely within the realm of consciousness should be excluded "a priori" from juridical valuation. This theory contains elements

sense. Such liability, in its turn, can be divided into civil and criminal. Criminal liability can only be derived from illegal acts (though not from every illegal act). Civil liability results from legal acts, as in the case of obligation "ex contractu." Some authorities apply the word "liability" only to obligations arising from illegal acts; but, even accepting this terminology, the logical relation of ideas remains, of course, unchanged. Cf. *Merkel*, "Elemente der allgemeinen Rechtslehre," § 22, n. 5–7; *Rocco*, "La responsabilità dello Stato nel diritto processuale penale" (Turin, 1904), § 5, p. 18 et seq.; *Forti*, "Contributi alla teorica della responsabilità della pubblica amministrazione," in "Studi e questioni di diritto amministrativo" (Turin, 1906), p. 182 et seq.

[18] There is also a juridical valuation, when, in order to permit self-defense, an act normally illegal is declared legal. Here, however, as is clear, it is a question of a true juridical right which overcomes an illegality, and not one of a mere removal of a penalty for an illegal act, which remains illegal. The practical consequence of this is that it is illegal to oppose an act of self-defense, though it is legal to hinder an agent lacking mental power to know his act wrong. The act in question is unpunishable in either case, but in the first (self-defense) it is legal, and in the second (lack of mentality) it is illegal. Herein lies the difference.

of truth but involves serious misconceptions which must be overcome. In the first place, what are internal acts? If we mean events of the spiritual order without any tangency with the concrete world, that is to say, an act without an objective fact, we express an idea not only fantastic but self-contradictory, as we have already seen.[19] Nothing can happen except in the physical world. Every act which includes a happening necessarily implies an element of the physical order. Clearly an idea, considered "per se" as a purely logical value, is without any characteristic of reality and lacks all physical condition. But an idea is one thing and ideation is another. The latter is the process by which the former is produced in consciousness and by which it is developed as a physical fact.[20] Ideas are acts only in this latter sense; this means that not ideas "per se," but only the fact of their psychological elaboration or empirical gestation, properly constitute action. This fact (like all others) has empirical conditions of development and all the concrete characteristics of reality. There is, therefore, in this respect, no distinction between mental and physical, internal and external acts. Thus thought (which would furnish a typical case of internal action) has an external aspect, and, as it were, a corporeal existence as a psychological fact. It constitutes an actual extrinsification of the being of the thinker and an effective manifestation of his life. In its object and content thought passes the bounds of concrete existence. It is "per se" something more than concrete existence. In its psychological actuality and its quality of fact it has, however, an empirical nature and is part of concrete reality. We find in it all the characteristics which contradistinguish every other form of

[19] Cf. § 89, ante.
[20] Cf. § 55, ante.

activity. It is here of special importance to remember that the act of thinking (like every other act) implies an exercise or movement of will. To place acts of intellect over against acts of will (as the classical school did)[21] requires that the indestructible link between (intellect and volition) be ignored. This link exists beyond the peradventure of a doubt, as is shown by psychological analysis. The old theory of faculties, which divides the human mind into ideation, feeling and willing is, or at least should be, cast aside forever.[22] Hegel emphatically points this out. "One must not imagine that one part of man thinks and another wills and that he carries thought in one pocket and will in another, for this is an idle fancy."[23] We must admit that in thinking man acts, and that his will is active, for psychic being is not formed of many parts mechanically joined but constitutes a single whole, which enters into every activity.[24] A distinction between external

[21] Cf. *Rosmini*, "Antropologia in servigio della scienza morale," Lib. III, Sec. II, Cap. II, p. 350 et seq.

[22] Cf. *Villa*, "La Psicologia contemporanea," p. 442 et seq., where can be found practically identical opinions on this point by *Höffding*, "Psychologie in Umrissen," *Sully*, "The Human Mind," *Jodl*, "Lehrbuch der Psychologie," and *Baldwin*, "Handbook of Psychology."

[23] *Hegel*, "Grundlinien der Philosophie des Rechts," § 4, p. 33. We do not, however, follow Hegelian intellectualism inasmuch as it conceives will as "a special kind of thought." Cf. § 92, ante.

[24] "The faculties of willing, feeling, thinking, etc., cannot properly be said to be its (the spirit's) parts, for it is the same spirit that enters fully in willing, fully in feeling, fully in thinking, etc." Thus, *Descartes*, "Méditation sixième" p. 120, ed. Charpentier (Paris, 1844), with the object of showing that spirit unlike the body, is indivisible. This doctrine of the indivisibility of spirit must logically lead to a belief in the unity of psychic life. And yet the superlatively intellectualistic character of Descartes' psychology prevents such a conclusion. For, with its conception of spirit as a "res cogitans" ("chose qui pense") it cannot reduce all psychic functions

and internal action has been based on the fact that some acts immediately affect the senses, while others escape unnoticed. The latter are, in general, the intellectual acts and those which are called "acts of internal will" (purposes). These are thought to be excluded by their nature from the realm of law. "Cogitationis pœnam nemo patitur."[25] Some jurists, not satisfied with this differentiation, deny absolutely that there are internal acts.[26] They exclude them by definition as lacking physical exteriority.[27] Practically all are of this opinion who believe that acts are the effect of antecedent psychic activities, for it is clear that in such a doctrine psychic activity (the formation of a proposition) is not an act.[28] To demonstrate the error of this belief, we will repeat some conclusions which we have already stated. Acts cannot be separated from their psychic elements or factors, but must contain them as essential parts. The psychic element is the subjective part of activity. It is a *quality* of action. It is not an antecedent fact. When a psychic fact (ideation, purpose

to such a concept. Cf. "Méditation deuxième," p. 72 et seq., "Méditation troisième," p. 79 et seq. One result of such extreme intellectualism, which prevented Descartes recognizing the unity of psychic life, was the absolute separation of corporal facts from those of the mind. Cf., on this point, his treatise, "Les passions de l'âme," 1st part, § 16 et passim.

[25] *Ulpian*, Dig. 48. 19. 18.

[26] For example, *Austin*, who at first followed Bentham's ("Principles of Morals and Legislation," p. 70) distinction of internal and external acts, later modified his teachings and wiped out the class of internal acts, for he came to the conclusion that it was not proper to consider mental facts as acts. "Lectures on Jurisprudence, or the Philosophy of Positive Law," 4th ed., p. 433; 5th ed. (London, 1885), Vol. I, Lect. XIX, p. 420 (cf. p. 365 et seq.).

[27] This restriction is the exact counterpart of the one applied to acts, on the ground that they lack the psychic element. Cf. § 92, ante.

[28] Cf. *Stuart Mill*, "A System of Logic," Vol. I, p. 59.

or deliberation) has an existence distinct in time, that is to say, it precedes the eventual execution, which may be expected, then it necessarily attains for itself a correspondence in the concrete life of the agent. It then is an actual explication of energy and has a physical side. It then fully satisfies the definition of an act.[29]

§ 95. *Non-Applicability of the Juridical Criterion Because of a Deficiency of the Physical Coefficient.* As we therefore cannot admit an absolute division, let us see if a minimum of perceptibility in certain acts which normally do not affect the senses constitutes a lack so fundamental as to eliminate them from the field of law. This question, it seems to us, should be answered in the negative for many reasons. The thesis that the activity of thought is impenetrable or unknowable by nature is not well founded. It can remain concealed more easily than any other form of activity, but it is not necessarily secret. It is revealed and recognized in many ways, also without words, even when an effort at concealment is made. The fact that thought is secret is a mere acci-

[29] It is worth our while to note that the contrary opinion, upheld by *Austin* (vide note 26, p. 138, ante), is denied by *Campbell*, who writes, "It is difficult to see why 'cogito' should not be classed as an act, just as 'curro' or 'haurio.' There seems to be no generic difference between the act of taking up a book to banish an importunate thought and the process of entering (without external aid) upon some mental exercise (e.g., a problem in geometry) for the same purpose." "Lectures on Jurisprudence, or the Philosophy of Positive Law," 4th ed., Lect. XVIII, p. 427, n. 21. Campbell further shows that Austin, in excluding psychic facts from the concept of action, is inconsistent. "The author elsewhere (p. 469), implicitly recognizes *meditation* as an act: further (p. 470), while he regards the conviction produced by evidence as a case of physical compulsion, he recognizes that non-belief may be blamable if the result of insufficient examination, refusal to examine, etc. The process of examination is therefore the object of a duty, and hence, according to his own analysis, it is an act. (Pp. 350, 378, 406.)

dent, not an essential characteristic. Now, it is axiomatic that other acts (even external) can remain hidden without affecting, in any way, their juridical quality. Whenever a juridical character is attributed to an act, it is based on the act being known. Thus, when it is said that an act of thought is not punishable, reference is had manifestly to a known act of thought, for otherwise the statement is senseless.[30] Psychic acts, therefore, cannot be differentiated on the ground that they are unknowable, but only because even when known they are not generally punishable at law. Does this fact show their indifference or non-existence in the eyes of the law? This is the crux, but the explanation cannot be doubted. As we have already said, punishment is only a particular result which in certain cases follows a prohibition.[31] As thoughts are generally not forbidden, they are not generally punishable. What is not forbidden constitutes the legally permissible. Thoughts, therefore, represent a branch of the legally permissible; an activity in conformity to law, not something foreign or indifferent to it. This is not an idle or foolish distinction. It involves consequences of the greatest importance. If the statement of the indifference of law to internal acts is accepted, it is not possible to conceive freedom of thought as a right,[32]

[30] *Grotius* stated this in substance, "Actus mere interne, etiamsi casu aliquo, puta per confessionem subsecutam, *ad notitiam aliorum perveniant*, puniri ab hominibus non possunt." "De Jure Belli ac Pacis," Lib. II, Cap. XX, § 18. Cf. *Roguin*, "La règle de droit" (Lausanne, 1889), p. 44. — If the maxim "cogitationis pœnam nemo patitur" refers to secret thoughts it is absurd, because not thought alone, but every act whatsoever, is unpunishable as long as it is hidden.

[31] Cf. § 93, ad fin., ante.

[32] We must recognize, however, that *Fichte*, after making an absolute distinction between external and internal acts and limiting

while it is treated as such by positive law which recognizes and protects it. Thus, especially in past ages, the limitations imposed upon freedom of thought (particularly in the punishment of certain religious beliefs) prove in the clearest way that, insofar as it is allowed, it is not disregarded by law but has a true and proper juridical significance. The statement, therefore, that law does not notice psychic acts is untrue. Neither can it be corrected by merely adding that law takes psychic acts into account only in their extrinsification. That is true in general, and we will consider the reason for it later, but it does not touch the point in question. Though law, when considering acts, moves from the physical, yet it touches the psychic side. This is enough to disprove the above statement. If an act is not "per se" apparent, it will have some ultimate manifestation which may even be a distinct act — as the "confessio subsecuta" of Grotius — by which it will enter the concrete world for juridical valuation. But this valuation really refers to the first act and not to its subsequent manifestation, which in such a case is only a means of ascertaining the former.[33] A juridical judgment can be, and

the applicability of law to the former, was logical in his deduction that there was no right to freedom of thought. "The scope of law includes only what lies in the exterior world; what is not the result of causality but lies in the interior spirit is governed by other norms — those of morals. Law, therefore, has nothing to do with freedom of thought, conscience, etc. For these internal acts there are rules and norms, but they are not those of law." "Grundlage des Naturrechts" (Jena, 1796), pp. 53–54. He is logical, we repeat, in respect to his premise, which, however, is bad. Others are guilty of a different error, in admitting a right to freedom of thought while denying the applicability of law to internal acts.

[33] And yet, inasmuch as the manifestation of a thought constitutes a separate and independent act, it too can be the object of a juridical valuation. Thus, the right of freedom of thought is not the same as the right to free expression of thought. The latter,

usually is, based on physical data, but its object is always an act, that is, a fact whose psychic element must be taken into consideration. Those who exclude internal acts from the realm of law, to be consistent, should disregard motive and intent in external action. In fact, explicit affirmations of this have been made.[34] But this is contrary to historical usage and rational analysis. Law can never be unaffected by the "animus" or psychic element of an act. Its importance is shown in every

historically distinct from the former, was more limited and restricted. Furthermore, its various forms were differentiated according to the different methods of expression (whence, censorship, special laws governing freedom of speech, etc.). The distinction between the right of freedom of thought and that of the free expression of thought naturally loses importance as the latter right is constantly more broadly construed until it approximates the former. This does not destroy the distinction in question, however, which can be seen whenever one act constitutes the revelation of a prior psychic act. In such a case, there is material for two distinct judgments or juridical valuations, one of the act of revelation and one of the act which it reveals. These two judgments are not necessarily similar. The thought may be licit, while its manifestation may be illegal. The contrary can also be true; for example, the confession of certain belief or criminal plan is legally enforceable, and such thoughts are prohibited, but their confession or revelation is a legal necessity.

[34] For example, *Kant* does not merely state that juridical duties are those in whose regard external legislation is possible ("für welche eine äussere Gesetzgebung möglich ist"), "Met. Anfangs. d. Rechtslehre" p. xlvii, that is, such as can be controlled from without. (For this interpretation, see *Fricker*, "Zu Kants Rechtsphilosophie" (Leipsic, 1885), p. 9 et seq.) But he holds that legislation has for its object only the externality of acts ("das Recht überhaupt nur das zum Objecte hat, was in Handlungen äusserlich ist") id., p. xxxvi. This is a very different thing, and means that the psychic element has no legal value. In this Kant goes further than *Thomasius*, who made a more moderate distinction between law and morals; ("Fund. Jur. Nat. et Gent.," Lib. I, Cap. IV, §§ 74–77, 87–91). Indeed, the Kantian theory of the legal sphere seems too essentially external and is juridically wrong.

branch of law. The weight given to intent in contract, and to the psychic state in the determination and imposition of criminal penalties and the distinction of bona fide purchasers from others are examples of this. Furthermore, increased attention to psychic factors is characteristic of juristic progress. As law is based on and interpenetrates life, it cannot disregard any of its essential elements, and in weighing human acts should not disregard the spirit which effects them. The supposed limitation of law to the exteriority of action is a preconception of some philosophers, but is not in accord with the true or actual state of law, and is no longer credited or applied by jurists. Even those who in general statements lend credence to it, and seem to recognize a division of acts into external and internal, and the restriction of law to the former, are found on closer examination to withdraw from the position.[35]

Schopenhauer says that an error is not entirely overcome until its source is shown. We must apply his theory especially here where the error is widespread and often treated as a fundamental truth. The followers of natural law have a definite practical object in view in holding that law does not regard psychic acts, or, in general, the interiority of action. It is to prevent the State's exercise of coercion over intimate individual beliefs and to insure that sphere of liberty which until now has been threatened by religious persecution. They would guarantee the inviolability of thought by showing that it is the absolute and distinctive property of every man of which he is in exclusive possession by nat-

[35] For example, *Green* at first states the principle that "nothing but external acts can be matter of obligation," but afterwards, upon deeper study, he is convinced that "much besides external action is involved in legal obligation." "Lectures on the Principles of Political Obligation," pp. 34 and 35.

ural right. This was the historical meaning of the doctrine, which, therefore, had a political side.[36] And with this résumé in mind, it is easy to see the origin of the equivocation, until recently so widespread, concerning the limits of the applicability of law. Its original meaning was not that the activity of thought was irrelevant or non-existent in the eyes of the law, but merely that it was not legally punishable. It meant only the legal recognition of freedom of thought as a private right. The whole dispute, therefore, was within the field of law. There was no discussion as to whether freedom of thought entered the juridical sphere or not, but only whether it was legal or illegal. It is unfortunate that the question was put as if it were a problem of separating law and morals in the abstract, while in fact it was only one of modifying the content of positive law in order to give citizens legal freedom. Thus, an express legislative declaration of the freedom of thought was not necessary (it would have been difficult of attainment at the time it was needed), and the State's implied recognition of it by a cessation of persecution served the same purpose. The vindication of a right assumed in this case the form of a limitation of law. This conception, which, in supposing a right without a controlling norm, is contrary to the most elementary juridical logic, could easily give rise to the opinion that the applicability of law could be judged from the sphere of its penalties,[37] as well as the other mistaken beliefs about the nature of law and its relation to morals, of which we have already spoken. In

[36] Vide *Spinoza*, "Tractatus Theologico-Politicus," Cap. XX, which is of capital importance here.

[37] That legislation can exert a direct influence upon human action only through penalties is Bentham's notion, "Principles of Morals and Legislation," Cap. XII (ed. Dumont, vol. I, p. 37).

substance, a demand of natural law or a juridical ideal of determinate content became a basis of legal theory. The equivocation lies in the proposition that law *cannot* invade psychic life and is *by its nature* indifferent to developments within the consciousness. A concrete postulate of justice and a deontological necessity (that the State should not limit freedom of conscience) are meant by this statement, but it is ambiguous and seems to indicate a logical necessity, a characteristic and essential part of legal theory, and as such has been introduced into the definition of law. The belief grew that the distinction between morals and law could be made on grounds of punibility, which, however, is only a sign of the distinction between right and wrong. In restricting in one particular the connotation of crime, the whole field of law was thought to be restricted. The truth of this can be seen at a glance. If law was so limited by its nature that it could not penetrate the mind, if internal motives of the spirit were, as was claimed, beyond juridical consideration, why did Kant and Thomasius, to say nothing of the others, so carefully work out and so bitterly uphold their political doctrines in this regard? Why should they have been forced to place a rational limit on the prohibitive powers of the State to respect and protect freedom of conscience, if it were not possible to attack this right by statute? It is clear that on such an hypothesis freedom of conscience would have no need of defence against the State, and the struggles throughout centuries for such a right, as well as the philosophical theories which sprang from them, would have been meaningless. The truth is that these doctrines were not so strenuously advanced and championed because they stated a new proposition, but in order to obtain positive recognition of an old and well-founded juridical principle (of natural

law). No point of differentiation in the logic of law was shown. Psychic facts and the psychic element in acts have been, and will continue to be, the object of juridical consideration, although, as we have said, only when shown in action. The reform sought and won lay in substituting one juridical value for another; in exchanging an illegal for a legal qualification. It in no way went beyond the sphere of law. In conclusion, we refute the opinion that law has a more restricted sphere of application than morals[88] or is in any wise limited to a single part of action. It may be admitted that many acts are juridically possible, that is, permitted by law, which are forbidden by morals, without affecting the agreement since this does not show that such acts are not regarded by law. Thus the simplest law implies a right to respect and protection. This is why a juridical valuation is possible and of practical effect even in those cases where it results in no concrete obligation or prohibition. This is the case with psychic activity in general, and the so-called internal acts. Thus, there can be no limitation of the applicability of law to human acts on the ground of a "minimum" of the psychic factor and we must recognize the possibility of a juridical valuation of every act.

[88] Bentham expressed this belief concisely when he said that morals and law had the same centre but not the same circumference. "Principles of Morals and Legislation," Cap. XII.

# CHAPTER II

## NATURE OF THE JURIDICAL CRITERION

LAW IS EXTERNAL. — LAW IS VALUATIVE. — LAW IS BILATERAL. — JURIDICAL AND NATURAL LAW. — LAW IS NOT FORCE ALONE. — MORALS AND LAW.

§ 96. *Differences between Legal and Moral Criteria.* In the first chapter we have shown the general character of the juridical criterion, namely its applicability to all acts. In this particular, law does not differ from morals; the difference, as we shall discover, lies more in the point of view than in the object.

§ 97. *The Juridical Criterion Must Lie in Variable Qualities.* Let us take as proven the principle that the juridical criterion is applicable to all acts, and that the determination of justice or the separation of the just from the unjust is always possible. It follows as a corollary that the criterion must furnish a means of distinction between acts. It cannot, therefore, be any component of the concept of action. In other words, a quality common to all acts cannot logically form the basis of juridical judgment. Force, for example, is such an element which, as a condition of every phenomenon, is found necessarily in every act.

§ 98. *Juridical Value.* By its purely formal property, the concept of law belongs to the category of values. Conformity to law means something different from physical or potential physical existence. It is *supra-existential.* The specific function of law is the separation of one act from another. The simple physical fact or possibility of existence, being common to both the

just and the unjust, is not such a distinctive or differential factor as can be the basis of any juridical proposition, for a judgment of what is just should constitute a rational principle for the gradation of facts. If a given act is accomplished, its physical possibility alone is proven. The question of its legality or juridical possibility is undetermined. That facts are logically subordinate to law means that a judgment of what is just is necessarily one of value, synthetic and not analytic in respect to empirical cognition of the reality. Law does not depend upon application to or connection with the phenomenal order. Law has a logical existence even when it is transgressed and its ideal nature is thrown into greater relief by the physical fact of infringement, because the violence opposed to it does not destroy.[1]

§ 99. *Laws of Nature and Juridical Law.* From what has been said we can see how the meaning of the word "law" varies with the object of its application. Natural laws,. as syntheses of the realities of experience, must conform to fact. If a fact breaks a natural law, the law has no value and, for that matter, cannot be law. Juridical law, on the other hand, is a model to be followed. It does not get its truth from phenomena, but tends to import it into them by realization through the will of an agent. If it is empirically broken, it does not cease to be of value in its own sphere and to act as a principle of practical reason.[2] Its truth

[1] Vide *Rosmini* on this point, "When a man's rights are oppressed by brute force, then he is looked upon with extraordinary interest by his fellows, his rights appear to burn with unwonted brilliance, and to triumph because they escape the action of violence, as if they were immortal and beyond all material power, which cannot touch them, but is excluded from the lofty and spiritual sphere where law reigns." "Filosofia del diritto," Vol. I, p. 126.

[2] *Brins* writes, "If a putative law of nature is broken, it is no law, for we recognize and know laws of nature only in reality:

can be impinged by another law but never by a fact, which as such is subordinate, even if it infringes or violates the law.

§ 100. *Juridical Law.* Thus it is that the possibility of transgression is a presumption and mark of juridical law. The logical function of law is, as we shall see, the establishment of a distinction between possible alternative acts, permitting some and forbidding others. This is a proof that, while in the natural order, law is essentially non-infringible and cannot be conceived of as possible of violation, the idea of violability or of wrong is an integral part of juridical law.

§ 101. *Right and Wrong.* The correlation of the two opposite extremes has long been noted and has led many to believe that the idea of right was posterior and subordinate to that of wrong. Chrysippus wrote: "Quo enim pacto justitiæ sensus esse posset nisi essent injuriæ? Aut, quid aliud justitia est quam injustitiæ privatio?"[3] Grotius defined right in a similarly negative way.[4] But Schopenhauer has insisted more than any other authority upon this point of view, holding that the concept of wrong is original and positive, while that of right is derivative and negative.[5] Yet this is going too far, and leads to the conversion of an undeniable truth into a paralogism. It is true that right

a legal rule can be infringed, and it remains law notwithstanding all illegality. It may be realized, but its quality of law does not lie in realization. It is as essentially ideal as a law of nature is real." "Pandekten," § 18.

[3] Cf. *Aulus Gellius*, "Noctes Atticæ," VI, I.

[4] "Jus hic nihil aliud quam quod justum est, significat, idque *negante magis sensu quam ajente*, ut jus sit quod injustum non est." "De Jure Belli ac Pacis," Lib. I, Cap. I, § 3.

[5] Vide *Schopenhauer*, "Die Welt als Wille und Vorstellung," Buch IV, § 62; "Ueber die Grundlage der Moral," § 17; "Parerga und Paralipomena," II Bd., Koeber's edition, § 122.

is the absolute negation of wrong, and that there can be no right except in antithesis to a possible wrong. "Rights involve the possibility of wrong, a condition of fact for which the law makes provision."[6] If the possibility of violation were eliminated, law would not have (as we have seen) any real and logical function, and so could not be conceived. It is true that law grows "in grazia della sua violabilità,"[7] so the presence of wrong is a constant stimulus to the growth of right. Juridical perception grows active when rights are attacked. The modifications and progress of legal institutions correspond to the disturbing influences which they meet in the development of social life.[8] The life of law lies

[6] *Puchta*, "Cursus der Institutionen," § XI, 8 ed., p. 16.

[7] *Petrone*, "Contributo all' analisi dei caratteri differenziali del diritto," p. 353, n. 1.

[8] On the function of wrong in the historical evolution of law, see the accurate observations of *Lasson*, "System der Rechtsphilosophie," § 44. On this subject, *Wallaschek* writes "that men usually begin the establishment of law when they can no longer depend on the spontaneous occurrence of certain acts." "Studien zur Rechtsphilosophie," p. 70. This may be true in general, but it does not mean, as Wallaschek thinks, that legal progress is accompanied by moral regress: "Generally in the life of the State the growth of jurisprudence accompanies a decay of moral purposes, which men attempt to strengthen by a corresponding development of the legal organism." The progress of jurisprudence is marked by greater complexity and intensity of social relations. The increase of points of contact between work and man necessitates new forms of legal protection. But with increased complication and intensity, social life does not become less moral. The new manifestations of wrong are accompanied by an increase of laws. The latter represent the more general practice, while the former are the exceptions. The historical argument which Wallaschek advances to sustain his thesis seems entirely without foundation. "On this subject we can say that the people whose morals from the beginning of their history until its highest point of development were the most wicked — namely, the Romans — have a full and complete jurisprudence, while the Germans with their

in a struggle against wrong, and can be understood only in correlation with this antagonistic opposite, which shows the resistance of social reality to the application of law. But, on the other hand, it is none the less true that wrong is not conceivable "per se," but only in contradistinction to right. Both ideas are interdependent and complementary, and suppose a common base — the juridical criterion. If it is true that right is merely the negation of wrong, it is likewise true that the latter is in its turn the negation of the former. Their antithesis implies co-ordination.[9] For how can we define wrong, tort, or "injuria," except by recourse to right, the legal, or "jus?" "Injuria ex eo dicta est, quod non jure fiat; omne enim quod non jure fit, injuria fieri dicitur." So Ulpian gives the definition;[10] and no force of dialectics can escape this logical necessity, which forbids the antecedence of the idea of wrong to that of right, because this would imply, in the last analysis, the infringement of a right which does not exist. Historically, we generally find that the fact of the violation is anterior to the law governing right, but this violation has no juridical significance, and can never constitute a wrong, tort or "injuria," except when a definition is accepted, which applies to the corresponding right.[11] The disturbance of a state of fact can be

high morals are lacking in juristic law." (Loc. cit.) But even admitting (what does not seem to us admissible) that the Romans always have been greatly inferior to the Germans in morals, still it is ridiculous to attribute the Roman superiority in law to the alleged moral inferiority.

[9] Read *Fichte's* profound demonstration of this logical principle in general in "Wissenschaftslehre," and cf. *Schwegler* in "Geschichte der Philosophie," p. 367.

[10] Dig. 47. 10. 1. pr.

[11] The origin of Schopenhauer's error lies in the ambiguity in the concept of infringement (Verletzung), vide n. 5 p. 149, ante, and cf. *Rümelin*, "Eine Definition des Rechts," p. 330.

the first movement toward the determination of a hitherto unrecognized right. But only at the moment that such a determination is given, the disturbance becomes a wrong. So the invasion of another's sphere of personality (which according to Schopenhauer constitutes the positive idea of wrong prior to that of right) is a violation in a juridical sense only when the sphere itself has been conceived and determined as a right.[12] It is absurd to speak of the precedence of ideas, which are correlative by nature. The determination of right and wrong are simultaneous, inasmuch as they form logically one thing.

§ 102. *Positive Law is a Fact.* When the inseparability of the ideas of right and wrong is accepted (the latter being but the physical violation of the former), it is evident that fact has not for itself an absolute juridical value. The way is thus open for an important statement. Positive law as the expression of existing rights is a fact. The establishment of juridical norms, in customs or as statutes, is an act of man. Hence it is that positive law is subject to a juridical criterion, or, to be more exact, to reason. It is always possible to form a judgment on positive law analogous to that which law forms on any act. Actual norms are not necessarily just.

[12] On this score we can observe that even the Roman maxim, "neminem lædere," implies a criterion which it does not give and which should determine where a wrong toward another begins. Only with this determination made does the maxim acquire a true juridical meaning; then, however, it places also a positive limit on rights ("qui jure suo utitur neminem lædit") and thus has an affirmative as well as a negative value. A somewhat similar observation can be made of another legal principle, "suum cuique tribuere," for this is mere tautology and not a juridical proposition until the "suum" is determined. Read the minute criticism of this and other tautological moral principles by *Simmel* in "Einleitung in die Moralwissenschaft," I Bd., p. 50 et seq.

The question of their justice is open, for they are not absolutely justified by their mere existence. The juridical criterion, therefore, is not empirical;[13] the requirement of justice remains superior to positive law. Its necessity — not positive — is natural and logical.

§ 103. *Positive Law.* The distinctive mark of positive legal determinations is the fact that they are followed in practice and are generally observed and obeyed. The weight given them in reality constitutes their positivity. In a given case there cannot be discordant legal principles. The same facts cannot conform to more than one legal principle. Positive law, therefore, naturally works into a system, and forms a coherent unit which does not admit of contradictory elements. Any principle which does not conform to it is "de facto" excluded from it, that is, does not exist as positive law. Of this result there can be no doubt, but does it change the logical nature of the principle? Is a juridical maxim, when not actualized, less juridical? Whoever entertains this belief, and states that law has only positive existence, is guilty of a serious error, transferring the laws of physical existence into the order of ideas. In phenomenal reality (let us repeat) only one of two discordant juridical principles can be applied, but in logic such incompatibility does not exist and both principles preserve their own being and definite significance, independent of their phenomenal consequences. Actualization, which is phenomenal, does not touch or alter the logical substance of an idea; wherefore, also an unactualized principle is juridical by nature if it is declarative of a criterion of action, which marks in some manner a distinction between right and wrong.

[13] Cf. *Filomusi-Guelfi*, "Del concetto del diritto naturale," p. 39 et seq.; "Enciclopedia giuridica," 1905, § 15; *Carle*, "La vita del diritto," p. xli; "La Filosofia," § 135.

§ 104. *Present Day Genesis of Positive Law.* Considering things objectively, it is evident that by the side of positive legal valuations there are others entirely analogous in individual consciousnesses. To deny this is to restrict deliberately the consideration to a single moment in the life of law (which is particularly reprehensible in a school making pretense to realism). It would be erroneous, too, to suppose that mental juridical determinations are mere fancies, unconnected and without influence on the determination of law. The truth is that there are deep, multiplicate, and permanent relations between them. The formulæ of positive law are rooted in the juridical precepts of individual minds, and constitute a certain synthesis or medial even if inadequate expression of those precepts.[14] The part which propositions in the individual consciousnesses play in the positive or empirical genesis of law is shown clearly by the manner in which historical changes take place. They are generally preceded or determined by a similar change in juridical beliefs. These beliefs become positive as soon as they have reached a certain degree of social weight so that they are enforced by the dominant power. But they do not arise at that moment. They were affirmed long before and have come to their position by a series of spontaneous and almost imperceptible steps. Sometimes a juridical proposition, upheld only by a few men, must long lie dormant and overcome powerful obstacles before taking its place in positive law. In this case, too, juridical thought is clearly anterior to its concrete actualization. Whoever, therefore, considers the juridical testimony of the mind as an imitative repetition or reverberation of norms positively actualized, inverts the real sequence. Above all, we must remember

[14] Read, on this point, *Del Vecchio*, "Il sentimento giuridico," p. 12 et seq. (2d ed., p. 16 et seq.)

that the reform of legal institutions (and their development likewise) would not be possible unless the human mind had the faculty of determining rules of justice independent of and prior to them and even, if occasion arises, contrary to them. This jurisdiction, which judgment exercises autonomously over objects already treated by positive law, and even over positive law itself, is a continuing proof of the principle which we have upheld in another way, that is, that law by its nature is superior to fact, forming in respect to the latter a criterion of ideal valuation.

§ 105. *Law is not Force Alone.* Our observations hitherto show the logical vice of the theories which hold that right is might. This equation has been often and variously stated. Plato and the Sophist, Thrasimachus,[5] enunciated it. Hobbes and Spinoza described (as everyone knows) a state of nature in which right was limited only by physical strength. But their object was to show that the concept of law has no true application save in a state of society, and that out of it there can be no difference between the just and unjust. So even their doctrines, based on this fundamental denial, really prove our claim, that law can only be thought of as a logical differentiation of force.[6] The

[5] In the first book of the 'Republic,' p. 338 *et seq.* "I state justice is nothing else than what is pleasing to the strongest." *Callicles* held a similar theory in "Gorgias." Cf. the comparative and critical analysis by *Petrone* in 'Le nuove forme della scetticismo morale e del naturalismo giuridico,' p. 131 *et seq.*

[6] *Hobbes*: cite especially 'De Cive,' Cap. I, § 10 *et seq.*, after asserting that "Natura dedit unicuique jus in omnia," outlines in detail the consequences of this literal meaning. "Effectus autem juris idem pene est ac si nullum omnino jus existeret." "Injustitia ergo hominum supponit leges humanas quales in statu naturæ nullæ sunt." An analogous observation can be made in regard to the doctrine of Spinoza. Cite especially 'Tract. Theol. Polit.,' Cap. XVI and

alleged "right of might" has, moreover, been the object of much debate.[17] Some authorities combat it by recourse to good sense and general knowledge.[18] But they, like nearly all the rest, base their denial on some moral thesis.[19] Romagnosi is the author of a criticism chiefly founded in logic.[20] By its categorical nature,

"Tractatus Politicus," Cap. II. In accordance with the pantheistic character of this system, Spinoza states in principle, "Naturam absolute consideratam jus summum habere ad omnia quæ potest," and deduces therefrom that men have rights commensurate with their physical power, "quamdiu sub imperio solius naturæ vivere considerantur." The distinction between the just and unjust can exist only in our reason and not in the eternal order of nature. Such a distinction would be effectively produced only since men, constituting society, agree together to restrain certain appetites and direct their own acts "ex solo rationis dictamine." And Spinoza concludes that only in a state of society can an act be held wrong, "injuria non nisi in statu civili potest concipi." This shows that Spinoza thought that right was relative to human and not to natural laws; wherefore the "summum jus" proclaimed in respect to the order of nature has no real significance and is equivalent to an absolute lack of rights.

[17] For the diverse meaning of this formula, see *Lasson*, "System der Rechtsphilosophie," p. 229 et seq.

[18] Vide, for example, *Rosmini*, "Filosofia del diritto," Vol. I, p. 126. "Common sense teaches and may always teach that law is something different from force; thus this same common sense is apt to distinguish between might and right." *Trendelenburg*, "Naturrecht," p. 11. "Simple force can never be law. The right of might is contrary to universal belief."

[19] See *Rosmini*, "Filosofia del diritto," p. 89. "Force shows only necessity; law and duty comprehend free-will, which is alternative." *Trendelenburg*, "Naturrecht," p. 10. "This belief makes law subservient to the will of the strongest, and thus it was a constant incentive to war and motive for wrongdoing."

[20] In his "Assunto primo della scienza del diritto naturale," § XIX, *Romagnosi* is precise in saying, "The idea of law implies conformity to the moral order of reason. On the contrary, not only just but unjust acts enter the sphere of the so-called law of might, which has no regard for norm, law or regulation. The predication

the thesis we have just advanced governs those theories too, which consider law as the immediate effect or result of the play of social forces.[21] Social forces are thought by many authorities to be entirely economic. They would base juridical institutions, "not on the so-called general development of the human mind, but on the material relations of life."[22] Yet even admitting that law enters the concrete world as the expression of the will of the dominant force or a transformation of physical power, still the principle remains secure that a true juridical criterion cannot be subjected to every expression of force so that every possible act appears just. If it were so, it would have no logical function and would not be a juridical criterion. We cannot agree, therefore, with Ihering's statement that the belief in the distinction of right from force in early law is an error caused by the illusory projection of modern ideas into the past. If it is true, as Ihering says, that

of law, which essentially includes a controlled force and excludes by definition all violence, is opposed to the arbitrary use of force. The law of the strongest is, therefore, both morally absurd and a contradiction in terms." *Rousseau* states the same convictions in "Du contrat social," Lib. I, Cap. III, "Force is a physical power; but I do not see how morality can be affected by it. To bow to force is an act of necessity, not of will. It may even be an act of prudence. In what sense can it be a duty? If obedience is not forced, there is no obligation to obey. It is clear that this word law adds nothing to force; it means here nothing at all."

[21] In this regard, see the theories of *Gumplowicz*, *Lingg*, *Stricker*, etc., who, though differing among themselves, all sound a materialistic note. Vide also, *Carle's* critical consideration of this conception, "La Filosofia del diritto" p. 75 et seq.

[22] Cf. Preface, "Zur Kritik der politischen Œkonomie" by *Karl Marx*. Here, we can say, is epitomized the programme of the school of historical materialism or economic determinism. For a criticism of this concept, see *Petrone*, "Un nuovo saggio sulla concezione materialistica della storia," in the "Rivista internazionale di scienze sociali," Vol. XI, 1896, pp. 551–560.

the ethical position of law in the world of to-day is "the final result of a long process of evolution, and does not represent its beginning";[23] if, in fact, it is proved that violence played a large part in the development of law in the ancient world, still it is true that, in so far as the use of force was considered legitimate, it was recognized as conforming to a principle to which it was always logically subordinate and from which it got its juridical value.[24] If we suppose a condition of facts, in which violence is accepted "per se," independent of any correlation to a criterion, on such a hypothesis it would in no sense be a law. Thus, there is another confirmation of the fact that the judgment of what is just must be a principle distinct and superior to that which determines physical possibility. Conformity to law is a metempirical quality conferred upon an act by its participation in a system of values.

§ 106. *Ethics.* To define specifically this quality, that is, the proper meaning of juridical values, we must first consider practical values in general. In other words, we should have as a basis an ethical principle, to which we can refer all values and norms of action. Such a principle is objectified in reality in a multitude

[23] See *Ihering*, "Der Zweck im Recht," 1 Bd., p. 247. The frequency of such illusions cannot be denied. It was noticed by Vico. More recently it has been insisted upon by *Maine* in his "Dissertations on Early Law and Primitive Custom," and "Ancient Law." But we may point out the possibility and even frequency of the converse error, which treats that as accidental and relative to particular existent circumstances, which, by logical necessity and the nature of things, is in some way eternal.

[24] Even *Ihering* finally admits this in his description of the way in which law is born of force: "Force sets for herself a limit which she respects, she recognizes a norm to which she will conform, and this self established norm is law." "Der Zweck im Recht," p. 245. Cf. *Stintzing*, "Macht und Recht" (Bonn, 1876); *Merkel*, "Recht und Macht," in "Gesammelte Abhandlungen," I Hälfte, pp. 400–428.

of particular determinations, whose sum is a system of regulations. Every system has, however, an internal coherence which shows the unity of its fundamental principle. This unity is a "sine qua non" of any research whose object is to make clear the distinctions and relations among the various categories composing the system. Under any ethical system whatsoever which contains a universal standard of action, there is always a double order of judgments and values, because acts can be considered from two points of view. In the first place, given an ethical principle, there always arises a distinction between the various acts which every man can do. Among the various subjective possibilities which are to be weighed, one alone will be found conforming to the principle, and all others must be contrary to it, as they will be found incompatible with the one. At any given instant, an agent's conduct [25] should tend to the fulfillment of the act determined to be necessary and to the omission of those incompatible with it, although they are physically possible. The quality of an act is always relative to the circumstances of the agent. The ethical principle so applied establishes positive and negative orders of necessity, which constitute moral duty. But the same principle gives rise to another kind of valuation of acts. Human acts can be treated not only as we have just treated them (subjectively) but objectively as well, that is, not treating the agent in relation to his own acts but in relation to those of other agents. The quality of compatibility is then different. The interference has an objective not a subjective form. Prevention, not omission, is here actually and logically opposed to acts. What conforms to principle in this sense is not what cannot be omitted, but what is not inhibitable. A

[25] Cf. § 92 and 93, ante.

limitation is placed on the action of other agents. The ethical principle thus tends properly to institute objective co-ordination and is shown in a double series of possibilities and impossibilities of action.

§ 107. *Fundamental Relation Between Morals and Law.* Objective ethical co-ordination includes the consideration of rightness. The two fundamental modes of weighing acts, which constitute the ethical categories of morals and law, come from the same principle according to different methods of application.[26] An act which, subjectively regarded, appears ethically necessary of commission or omission, objectively is ethically possible or not in inverse ratio to its impedibility. The unity of principle is shown in the series of relations, which include both ethical forms. What is ethically subjectively necessary is always ethically objectively possible. If this were not so, an inhibition would be possible by one agent to a possible act of another, both acts being governed by the same principle, which would then be self-contradictory, and, therefore, without power to direct action. Likewise, what is not ethically possible is never ethically necessary. In the same system, an act cannot be inhibitable on one hand and demandable on the other. There is a fundamental relation in every case between the two forms of ethical

[26] We might note here that no other form than these is possible for valuation of acts. Other conceptions of diverse significances are improperly considered as ethical categories analogous to those of morals and law. For example, custom is the fact of the observance of certain norms, either moral or juridical, but is not a special kind of norm. Decorum or convenience (defined by *Thomasius*) is a special criterion, which in its translation into precepts assumes necessarily the form of one or the other of the two categories. Religion is the complex of beliefs or dogmas which can serve as a basis for a system of determination of conduct, but this system, though so constituted, consists however in moral and juridical determinations.

valuation. It is expressed by the universal maxim: *What is duty is always lawful, and that cannot be duty which is not lawful.* It is evident that the reverse is not true, because ethical necessity cannot be inferred from ethical possibility, as the latter can be inferred from the former. An act being ethically possible, that is, in conformity with law, means only that the ethical principle does not prohibit it, not that it requires it. The determination of the lawful is not that of duty. What is law is not "per se" moral. And yet the possibility shows the boundaries within which the agent should of necessity be restricted. It does not follow when an act is ethically possible (in conformity to law) that it is a duty, but considering all the ethical potentiality of an agent, that is, all the acts which the law permits him to do, it follows that he must necessarily choose one of those acts. The concept of ethical necessity or duty is thus limited objectively. This is duty in a juridical sense. It shows the limit of everyone's possibilities but has its necessary correlative in the potentialities of others.

§ 108. *Morals and Law are Always in Accord.* The elements of all the phases of law which constitute its concept are found in this logical nature of it. But, before taking up their phases in detail, we must first point out one thing to make clearer what we have said already. Since the relation between the two forms of ethical valuation, moral and juridical, is determined "a priori," no case can be found in experience which disregards either of them, although there seems sometimes at first blush an incongruity (as Paulsen says), so that what is morally right and necessary is legally prohibited.[27] Now, we must first admit that nothing prevents one ethical prin-

[27] See *Paulsen*, "System der Ethik," 6th ed. (Stüttgart, 1903), II Bd., p. 166 (Cf. p vi) and 171. Cf. *Sidgwick*, "The Elements of Politics," 2d ed. (London, 1897), Cap. XIII, especially p. 204 et seq.

ciple from being empirically incompatible with another, so that the simultaneous observation of both is impossible. An act, therefore, can appear necessary both of commission and omission, and inhibitable and necessary according to the principle taken as a measure of value. But such decisions are based on the principle in which they arise and could not be compared unless they had a common basic principle. To determine the relations between different ethical values, we must refer to some single system, logically determined by a single principle, and disregard all values attributable to the object by other principles. With this understood, it is clear when the objective possibility of an act is denied by a principle, its subjective potentiality cannot be affirmed by the same principle. In other words, what is contrary to law cannot be held moral. Whoever affirms the morality of an act thereby recognizes an ethical principle which implies its legality, that is, its possibility of objective co-existence. Because of the logical relation (which we have already shown) between the possible and the necessary, and because a principle whose object is the control of action cannot be impossible of actualization, therefore unattainable, which, in respect to an ethical principle, would be a true "contradictio in adjecto." The truth of the alleged antinomy between morals and law is this: that an act can be the object of diverse judgments; and it can be weighed by individual criteria, different from those moulded in positive institutions. The antinomy does not exist between morals and law, but between different ethical criteria; all of which, duly applied, would give rise to a harmonious system of juridical values, and within every system the logical relations established would remain firm. We must remember, therefore, that morals and law are correlated ethical

categories, presupposing a common base. Attributing to law a degree of certainty or strength different from that of morals is a constant source of error. Ahrens makes this mistake when he says that "moral precepts are absolute, invariable, and independent of time and place, while legal precepts or juridical decrees are relative and variable."[28] Such a disparity is in contrast with the formal nature of the relation between morals and law. Whoever holds a duty absolute must recognize the law governing its effectuation as absolute in its turn. In like manner, whoever admits a natural law, that is, a system of juridical demands founded on simple human nature, cannot fail to admit corresponding natural duties. The same degree of certainty and naturalness enters morals and law. Whoever, therefore, denies the existence of natural law, should reach, to be consistent, an analogous denial of morality and duty.

§ 109. *Distinction between Morals and Law.* The juridical criterion differs from the moral, as we have said, by its logical position. Juridical consideration means treating an act as part of the external orders interacting with the acts of other agents.[29] The juridical value of an act is not self-determinative; it lies in its harmonization and co-ordination with others. The logical function of law exerts its influence where a collision between the acts of two or more agents or an antithesis between two or more wills is possible, and tends to promote objective ordination among them. The moral criterion, on the other hand, supposes an antithesis between two or more possible acts of the same agent and tends to settle internal strife, that is, to

[28] *Ahrens*, "Naturrecht oder die Philosophie des Rechts" (Vienna, 1870–71) I Bd., p. 311.

[29] Cf. *Petrone*, "Contributo," p. 340 et seq.

establish a subjective ethical order. From this come the diverse elementary characteristics, which delimit the proper spheres of each.

§ 110. *Law is External.* Juridical valuation begins with the external side of human action, because it is in the external field that the objective interference between the conduct of two or more beings arises, and, therefore, it is there that the demands for limitation arise. But juridical valuation from the external side necessarily embraces the internal or psychic element, without which its object would in no wise be an act.[30] The moral criterion is differently applied, because its purpose is to settle the opposition and interference which take place within the internal consciousness of one agent, and to show which of various possible acts he must chose as conforming to principle. A moral judgment, therefore, is applicable to motives, and regards the acts resulting therefrom, while a juridical judgment is based on external phenomena and from that viewpoint determines the motive and internal life of the agent.[31]

§ 111. *Law is Bilateral.* Another consequence of the logical nature of law is that its decrees are bilateral. The purpose of law is, as we have said, to establish a correlation between two or more agents, resulting in a balance of definite powers and duties. It is not a

[30] Cf. Cap. I, ante.

[31] This explains how a moral judgment is exercisable pre-eminently over the agent himself, while law is concerned more properly with others. The former takes an internal point of view, the latter one that is external. One can only judge of another's morality by placing one's self ideally or fictitiously in his place. One judges of one's rights by taking another's point of view and considering one's self objectively. Hence the dangers and difficulties, always recognized, of a moral judgment "in causa aliena" and of one that is juridical "in causa propria."

question, as it seems at first glance, of two distinct acts, of two propositions, separate or connected only accidentally or artificially, but of one act, of a single proposition, which is essentially complex and reciprocal. The possibility, on one side, equals the necessity on the other. Each term finds its meaning and scope in the other. What is legally possible is, because of its possibility, legally enforceable. Enforceability is not a superadded or complementary element, but is the logical essence of law itself. The characteristics here theoretically deduced exist as historical realities; they are phenomena. It could not be otherwise, because the juridical nature of a phenomenon lies in its correspondence with this formal type. By the perception of this type we can grasp the juridical aspect of reality and observe how the logical factors implied by the concept of law develop therein and assume concrete existence. The study of positive law, being subordinate to this primary knowledge, can, however, help in the process of analysis by giving particular examples and explanations. We will have recourse to it in the following pages, wherever in the treatment of the various phases or logical characteristics of law we have occasion to recall those experiences, in which they are shown in their real application and development.

# CHAPTER III

## IMPERATIVE QUALITY OF LAW

GENESIS OF LAW. — IMPERATIVE QUALITY OF LAW. — TRADITIONAL CLASSIFICATION. — IMPERATIVE, PROHIBITIVE AND PERMISSIVE NORMS. — EXPLICATIVE NORMS.

§ 112. *Law is Based upon Ethical Co-ordination.* Our observation up to this point has shown us that law in its essence requires a relation between several individuals, so much so, that no juridical value can be attributed to the conduct of an agent which does not have reference to some other agent's conduct. This conclusion defines the fundamental sphere of law. No juridical criterion is possible except where there is a number of individuals whose respective acts meet and encounter each other on common ground.[1] The phenomenal appearance of law is, therefore, co-extensive with the establishment of a system of ethical co-ordination of reciprocal rights and duties. The origin of law lies in the objective determination of the correlated interests and obligations of various individuals. By this we do not mean to fix the historical moment, but only the "a priori" condition of the recognition of the phenomenon of law.

§ 113. *Genesis of Law.* To give the principle which forms the essence of a concept is entirely different from showing the beginning of its concrete realization. The

[1] "The concept of law is the conception of a relation between rational beings. It exists, therefore, only on the condition that such beings are thought of in relation to each other." *Fichte*, "Grundlage des Naturrechts," I, p. 53. Cf. *Petrone*, "Il diritto nel sistema della Filosofia dello spirito" (Naples, 1906), p. 21 et seq.

former may be determined when the lack of historical data renders the latter impossible. Thus, however far back we trace the development of life, we cannot find the moment when law first appeared. Some system of ethical thought, perhaps rudimentary and ill-defined, is found in every stage of human life. Historical research does not show men before they lived together. And even in the primitive forms of collective life, some policy regulative of behaviour is found, which forms a system of law[2] in relation to the sentiments of the individuals who compose the aggregate, and adapted to the nature of surrounding circumstances. Nor could it be otherwise, since without a connecting link of this kind, that is, without a system of mutual assistance, no

[2] "We find positive law existing among all peoples who have entered the stage of documentary history. Its origin must be anterior to this period." Thus writes *Savigny* in his "System des heutigen römischen Rechts," adding, "General law arises in an invisible way and cannot be referred to an external event or definite moment." Here the tendency of the historical school to make a mystery of the genesis of law is very marked. On this score, see *Puchta*, "Cursus," § XIII et seq.; and for its criticism, cf. *Ihering*, "Der Kampf um's Recht," 14 ed. (Vienna, 1900), p. 10 et seq.; *Fragapane*, "Il problema delle origini del diritto," p. 152 et seq. While later studies, especially those of Bachofen, Maine, Post, Leist, Morgan, Lubbock, McLennan, Tylor, Spencer, Kohler and their followers, have thrown some light on the oldest antiquity and enlarged the horizons of the historical school, yet no one can be said to have shown an absolutely pre-juridical or pre-social state of evolution. Petrone distinguishes justice from law, calling the latter a crystallization or historical precipitate of justice. See *Petrone*, "Contributo," p. 361 et seq. This process by which law grows constantly more technical, articulate, and reflective in form must at any rate be considered as a change in degree, not in nature. Thus Vanni thinks that the essential elements of law are found implicitly or in germ even in the rudimentary forms. See *Vanni*, "Maine," § 6, p. 64 et seq.

real community of life among men could be conceived.[3] Juridical determinations are first shown "rebus ipsis et factis," that is, by general usage. Subsequently, they are upheld by isolated judgments in particular cases[4] and then solemnly transformed into rational formulæ, or laws in the strict sense of the word. But always, even when laws are introduced in some other way than the usual one above indicated, the will appears which sustains and posits the juridical idea.[5] The system of juridical

[3] "The idea of justice," writes *Carle*, "develops in man when he comes in contact with other men, and can be called the architectural idea of human society." "La vita del diritto," p. 510. He re-enforces this belief in his other work, "La Filosofia del diritto," p. 120 et seq., where he writes that "society is natural to man and law coeval with human society."

[4] The first belief of Maine was that decisions were anterior to custom (vide "Ancient Law," Cap. I). The untenability of this opinion, held nevertheless by many good authorities, appears manifest because to uphold it, it would be necessary to admit that there was an age in which it was customary for the members of society to submit their reciprocal relations to a judge. And this fact of recourse to a judge, then, would have constituted a juridical custom. A decision always represents a "posterius," or something which removes a doubt or settles a dispute, which has come as an exception in the ordinary course and the spontaneous changing relations of life. While it is undeniable that judicial decisions play a principal part in the later development and elaboration of custom, yet it is none the less true that custom represents the first historical datum. That the oldest decisions originated in pre-existing custom, from which they were in substance deduced, was moreover explicitly acknowledged by Maine in his later works. "These sentences or themistes are doubtless drawn from pre-existing custom or usage." "Dissertations on Early Law and Custom," p. 563. *Vanni* pointed this out in "Maine," p. 58. For the primitive forms of juridical sanction, see the treatise of *Fragapane*, "Il problema delle origini del diritto," especially p. 205 et seq.

[5] This element of will is usually called "general." It must be admitted that the formation of a norm supposes a "minimum" of general consensus even outside the field of customary law. The

propositions and ideas, upheld by the dominant social will, constitutes what is said to be the positive law of a people.

§ 114. *Genesis of Juridical Ideas.* The existence of will cannot be doubted when law is declared by legislative act, but it must be acknowledged even when law is tacitly expressed by custom. We must be careful, indeed, not to fall into the error of believing that a practice long followed will "per se" create a legal principle. The simple fact of constant uniformity of action cannot create law but can only be a means of revealing the popular will. Custom only indicates law.[6]

faculty of legislative bodies to affirm their own will as the will of the State is referable as a rule to a certain psychological adhesion of the citizens. Cf. *Thon*, "Rechtsnorm und subjectives Recht," p. 1, n. 4. If, however, the predicate of generality can be said to correspond to a natural characteristic of the origin of law, it can in no legitimate way be held as an essential part. Neither is it always true that the legislature is a simple organ for the transmission of the popular will and "concentrates in itself," as *Savigny* says in his "System des heutigen römischen Rechts," § 13, p. 63, "the spirit, sentiments, and needs of the nation," nor is the vigor of juridical institutions which do not correspond to the general beliefs of those subject to them inconceivable. Cf. *Rotteck*, "Lehrbuch der Vernunftrechts und der Staatswissenschaften," 1 Bd., 2 ed. (Stüttgart, 1840), p. 71; *Beseler*, "Volksrecht und Juristenrecht" (Leipsic, 1843), p. 76 et seq.; *Bruns*, "Das heutige römische Recht" in "Encyklopädie der Rechtswissenschaft" of Holtzendorff, 4 ed. (Leipsic, 1882), p. 396. What is essential for law is only a will to affirm it. The fact that the will is determined by psychological and natural conditions, as we have shown, does not prevent its existence being self-affirmed nor that the existence of will marks the decisive moment in the establishment of law. The substitution of motives or the real object of the will for the will itself is one of the most frequent and serious errors in the study of law, as we will have to point out in Cap. VI, p. 207, post.

[6] This conforms to the Roman concept, explained in the known sentence (Dig. 1. 3. 32. 1.): "Nam quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis?" See also Dig. 1. 3. 35 and 36. The historical school deserves credit for recognizing

Upon the establishment of a scheme of legal maxims or ideas, the will tends to develop and maintain a social order in which individual acts of commission and omission will be reciprocally compatible. This juridical co-ordination[7] is not, however, the immediate object of the will, which is always directly referable to the agent by whom the conduct is effected and the realization of the order is demanded. Will can refer only to an act, either of the subject self or of another.[8]

that custom is only revelation of popular will. Cf. *Puchta*, "Das Gewohnheitsrecht" (1828–37); "Cursus," § XII et seq.; "Pandekten," 12 ed., §§ 10–12. In the last book he says specifically, "The basis of the existence (of customary law) lies in its quality of direct popular belief, its practice makes it visible. Habit, custom, 'usus,' or 'consuetudo,' is not the source of customary law, but the outward shape in which it is embodied." And *Savigny* ("Syst.," § 12, p. 60) admits that "custom is a sign of positive law, but not its original cause." But he adds that in certain cases it can be a "concurrent cause," inasmuch as it is an effective element. The later writers have generally followed the opinion that custom is a mark of law, not law itself. Some, however, have emphasized its importance as productive of norms, inasmuch as it "per se" originates juridical convictions. Cf. *Windscheid*, "Pand.," § 15, n. 2. It is certain, however, that until such a conviction, "opinio necessitatis," has arisen, the fact has no juridical value. Cf. *Vanni*, "Della consuetudine nei suoi rapporti col diritto e colla legislazione" (Perugia, 1877); *Miceli*, "La forza obbligatoria della consuetudine giuridica" (Perugia, 1899); *Filomusi-Guelfi*, "Enciclopedia giuridica," § 20 et seq.

[7] Cf. *Merkel*, "Elemente der allgemeinen Rechtslehre," § 1.

[8] See on this point *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Zw. Th., p. 342; "Will can affect the future conduct of the agent or of another, and this other, in the case of the will of man, can be either a rational being or, under certain conditions, an animal. Will apparently directly affecting the control of action (using this word as differing from the principle of activity) always regulates the activity which effects the act, whether it be the agent's or another's." In accord, see *Schuppe*, "Der Begriff des subjektiven Rechts" (Breslau, 1887), p. 15 et seq.

§ 115. *The Imperative Character of Juridical Norms.* Inasmuch as juridical propositions express a need of the commission or omission of an act, they determine the acts of several agents in a correlative sense. They are, then, norms to be followed. An imperative quality is inherent in the nature of law. Cicero [9] pointed out the "jubere" and "vetare" as essential to every juridical proposition. And while Modestinus adds the "permittere" and "punire" to the "imperare" and "vetare," [10] we must remember that penal laws are imperative because they command the infliction and submission to a penalty, [11] and furthermore because punishment presupposes the violation of a definite command (implied by every penal law). [12] As to the "permittere," we will see in a subsequent paragraph, [13] how are to be explained the so-called permissive laws. [14] Thon [15] explains the general imperative nature of juridi-

[9] See *Cicero*, "Pro Flacco," VII, § 15, "De Leg.," II, Cap. 4, § 8, 9.

[10] *Modestinus*, Dig. 1. 3. 7.

[11] Read on this point *Marcadé*, "Spiegazione teorico-practica del codice Napoleone," Vol. I (Naples, 1871), p. 31. "Imperare," includes "punire," because law does not punish or inflict a penalty, but makes such an order.

[12] Cf., Cap. V, p. 193, post.

[13] Cf. § 121, post.

[14] *Modestinus* in another passage (Dig. 44. 7. 52. 6.) gives the meaning of juridical norms as "quæ fieri præcipiuntur vel fieri prohibentur." Similarly, *Chrysippus* defined law "præceptricem quidem faciendorum, prohibitricem autem non faciendorum." "Προστατικὸν μέν ὧν ποιητέον ἀπαγορευτικὸν δὲ ὧν οὐ ποιητέον." (Dig. 1. 3. 2.) *Savigny* writes concerning the statement of Modestinus cited in the text that "the four cases are to be understood as the simple enumeration of effects of law and not as a basis of classification." "Syst.," § 16.

[15] See *Thon*, "Rechtsnorm und subjectives Recht," "The whole law of a community is only a complex of imperatives," p. 8.

cal norms by saying that in every juridical maxim there is an implied "Thou shalt" or "Thou shalt not."[16] Even if the legal command or prohibition does not appear externally as such, and if it is discoverable only by the consequences of an infringement, nevertheless there must be an imperative or "præceptum legis."[17]

§ 116. *Non-Juridical Statutes.* Bierling,[18] in this regard, points out that no one can deny that many laws contain propositions which lack not only all juridical form but also all imperative meaning. But we cannot conclude from this that there are juridical propositions which are not imperative, for the non-imperative propositions (as historical statements, etc.,) found in law are not juridical.[19]

§ 117. *Classical Division of Juridical Norms.* In order to grasp fully the imperative nature of law, let us now consider particularly the classification of juridical norms. According to the so-called classical

[16] *Thon*, "Rechtsnorm und subjectives Recht," p. 2.

[17] "The function of law," wrote *Romagnosi*, "is not to teach or discuss nor to advise or counsel, but to order the commission or omission of an act. The action of law has been recognized in all ages as obligatory and imperative." "Assunto primo della scienza del diritto naturale," § XXIX. *Ihering*, "Geist des römischen Rechts," Zw. Theil, Zw. Abth. (Leipsic, 1875), p. 358, agrees with him, "The regular form in which law appears in statutes is imperative, that is, as a direct practical form of command or prohibition. Law may or may not have, however, an imperative form. It is not important. The imperative lies in the idea or thought. The verb "is" in statutes always conveys a necessity. For example, "This action is barred in two years," means "must be barred." Cf., too, "Der Zweck im Recht," I Bd., p. 330 et seq.

[18] *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Zw. Th., p. 16 et seq., 344 et seq.

[19] Canon law and the more ancient forms of legislation are often in this state. Cf. *Maine*, "Dissertations on Early Law and Primitive Custom."

view, law is divided into three classes, imperative (or preceptive), prohibitive and permissive.[20] There would be, therefore, some juridical norms reducible to commands or prohibitions, and others that grant liberties or powers.

§ 118. *Thöl's Classification of Juridical Norms.* A deeper consideration of the subject, however, led Thöl to introduce a new classification.[21] He divided juridical norms into positive, negative and explicative ("berechtigende," "verneinende" and "begriffsentwickelnde"). His first class includes the three classical divisions. The second is composed of those which deny or limit the applicability of other norms to certain states of fact. The explicative develop a concept or declare more minutely what has been established by other norms. This classification is accepted in substance by Windscheid,[22] who states that "not all legal norms contain a

[20] See, for example, *Glück*, "Pandekten," I, § 14. *Savigny* pointed out that one flaw in this theory is its limitation to law. It should also apply to custom. (Vide "Syst.," § 16). *Brinz*, who follows the traditional classification (vide "Pand.," § 18) holds: "This division marks the imperative, prohibitive, and permissive," but avoids its consequent fault by applying it to all objective law.—There is, moreover, a fourth class, composed of dispositive (called also suppletive or indicative) norms intended to supply volition, where the agent has left some relation in an indefinite state. Savigny formulated this concept ("Syst.," § 16). He was followed by *Warnkönig*, "Juristische Encyklopädie" (Erlangen, 1853), p. 31 et seq.; *Windscheid*, "Pand.," § 30, and note 1. Cf. *Lasson*, "System der Rechtsphilosophie," pp. 423 and 426. The other norms in contradistinction are called absolutely obligatory, coercive, or enforceable. But in fact dispositive or suppletive norms, if applied, are within their field no less obligatory than the others. This bi-division has, therefore, only a secondary value and the questions concerning the imperative nature of law to which it could give rise can be better answered according to the other criteria of classification, which we will consider.

[21] *Thöl*, "Einleitung in das deutsche Privatrecht" (1851), §§ 33–36.

[22] *Windscheid*, "Pand.," § 27.

command or prohibition," and then follows Thöl's division, yet holding that permissive norms do not form a class of their own but "in fact are either imperative, prohibitive or negative."

§ 119. *Explicative Juridical Norms.* As the third class of explicative or declarative[23] norms, however, are enacted by the legislature, they always include a command; that, for example, such a word should have such a meaning. Bierling, in arguing this point,[24] distinguishes clearly between the philological explanation of a word and the declaration that it shall be used in a certain sense. While there is no imperative character in the first case, there is in the second, which is the case of legislative definition. In fact, in legislative definitions, the will of the legislature is exercised over the judiciary, commanding the latter to understand and apply certain terms with a definite sense and meaning.[25] Others have followed different reasoning to arrive at the same conclusion that explicative norms are preceptive or prohibitive, thus denying any intrinsic difference in the nature of the three so-called classes. What, in fact, can explicative norms be (it is asked), unless (as the name implies) they are explanations of other norms? They are not self-dependent, but rely upon the norms

[23] We can cite as example, "In criminal law, next of kin ('prossimi congiunti') means . . ." (Art. 181, Cod. Pen. Ital.). "Trees are realty (immobili) until detached from the soil" (Art. 410, Cod. Civ. Ital.) "The purchase of material or merchandise for the use or consumption of the vendee is not an act of trade" (Art. 5, Cod. di Com. Ital.). ["In all criminal prosecutions, the accused hath a right to be heard" (Art. I, § 8, Const. Penna.). — *Tr.*]

[24] "Zur Kritik der juristischen Grundbegriffe," Zw. Th., § 133, p. 25 et seq.

[25] Cf., especially, *Ihering*, "Der Zweck im Recht," I Bd., p. 334 et seq.

which they qualify, being either part of them [26] or their more specific repetition.[27] The dependent norm has, of course, the same logical necessity and imperative force as the underlying law. Both of these lines of reasoning are correct. They are interchangeable. We can conclude, therefore, that the theory of the general imperative nature of law suffers no exception in the explicative class.

§ 120. *Negative Juridical Norms.* It is easy to see, too, that the so-called negative norms, which form the second class, contain true and real commands because, on one hand, they enforce the recognition under certain circumstances of the abolition of some preceptive or prohibitive norm (either in whole or in part),[28] and, on the other, because owing to this it is always possible, as Thon points out, to convert them into one of the latter.[29] Thus these norms, like the explicative, always have the imperative character of a juridical proposition.

§ 121. *Permissive Juridical Norms.* The most difficult question is over permissive laws. In many cases it is clear that a permissive form is used in place of an imperative, signifying a true and real command or pro-

[26] Such is *Thon's* concept in "Rechtsnorm und subjectives Recht," p. 347, n. 51. "They (the explicative laws) are properly but parts of others." So *Merkel*, in "Elemente der allgemeinen Rechtslehre," 1, § 4, n. 4*b*., "At the same time it has not been sufficiently observed that the explicative laws are throughout parts of prohibitive laws, and only so far as they have this property do they possess legal significance."

[27] This is *Schuppe's* opinion, "Der Begriff des subjektiven Rechts," p. 17, et seq.

[28] See *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Zw. Th., §§ 130, 135.

[29] See *Thon*, "Rechtsnorm und subjectives Recht," p. 347, n. 51, where he says that there is no reason for making a separate class of negative norms.

hibition. This is the case where the permission has a correlative duty. Windscheid gives as an example,[30] "One contracting party can demand of the other the fulfillment of his promise," which is but a different way of saying, "Every promissor must carry out his promise." In other cases, however, the permission does not seem, as in the example given, to be a simple paraphrase of an underlying imperative. Take the permissive right of self-defense, or that which allows a trustee to renounce a trust [31] or a gambler to avoid his debt. And so it seems generally necessary to distinguish permissive norms from those of an imperative nature. But this distinction lies wholly in appearance. For when permissive norms do not directly involve a command or prohibition, they always contain a limitation (or negation) on other imperative rules. They are, therefore, nothing but negative norms or a method of their presentation; and as such they are as imperative as the others of this class. This is no new concept — it is found clearly outlined in Savigny.[32] In a reference to the old tri-division he says in so many words, "The 'permittere' gains its importance only from its relation to a precedent prohibition, which is either abrogated by the permission or limited by an exception." Analogous observations are found in Rosmini, "A positive permissive law would, properly speaking, be only an entire or partial destruction or suspension of an antecedent positive law. Thus it would be a negation, clothed with the external positive forms of law."[33] If it is true (as is generally admitted)

[30] *Windscheid*, "Pand.," § 27, n. 7.

[31] [The Italian words are "mandatario" (mandatory) and "mandato" (mandate). A mandate is a bailment, where the bailee contracts to perform gratuitous service with reference to the thing bailed. — *Tr.*]

[32] *Savigny*, "Syst.," § 16.

[33] *Rosmini*, "Filosofia del diritto," Vol. I, p. 156, note.

that all that which is not juridically forbidden is juridically permitted, a permissive juridical norm has no reason for existence and is not even conceivable.[34] It can only have a meaning in respect to other presupposed commands, whose sphere of application it in some wise limits or restricts. Its office appears most clearly in those cases in which it destroys some doubt concerning the meaning or extent of one or more pre-existing juridical norms, and in those in which it establishes some exception in regard to some especially designated person or thing.[35] In general, even where the permission seems to have an autonomous nature and to stand by

[34] Note under this head the following passage from *Puffendorf* (copied in substance from *Grotius*, "De Jure Belli ac Pacis," Lib. 1, Cap. I, § IX), in which the difficulty of giving a juridical meaning to permissive norms is squarely met but not overcome, "Eo ipso autem dum legibus tribuitur vis obligandi, ex numero legum proprie dictarum permissiones exclusæ intelliguntur. Nam permissio proprie non est actio legis, sed actionis negatio. Quæ lex permittit, illa neque præcepit neque vetat; adeoque circa eadem nihil agit." "De Jure Nat. et Gent.," Lib. I, Cap. VI, § 15. *Romagnosi* expresses the same thought in his "Assunto primo della scienza del diritto naturale," § 1: "An act permitted is strictly an act neither touched nor ruled upon by law. Legality, which implies necessarily an obligation to do or omit, makes the concept of permissive law absurd." In fact, permissive norms would be absurd if they were independent. On the concept of "lex permissiva," see also *Selden*, "De Jure Nat. et Gent.," Lib. I, Cap. IV; *Thomasius*, "Fund. Jur. Nat. et Gent.," Lib. I, Cap. V, §§ 6–8; *Barbeyrac*, in his comment on the above passage from Puffendorf; *Burlamaqui*, "Principes du droit naturel," Pt. I, Cap. X, §§ V–VII; *Kant*, "Zum ewigen Frieden," 1 Abschn., at the end; *Fichte*, "Grundlage des Naturrechts," Intro. III, and § 7 (p. 101).

[35] Here we must notice the distinction between "jus singulare" which refers to a certain class of persons, things, or relations and special laws or "privilegia," which refer to persons ("constitutiones personales, quæ personam non egrediuntur") (Dig. 1. 4. 1. 2.), things, or relations, individually chosen. See *Puchta*, "Pand.," §§ 14, 30, 31; *Arndts*, "Pand.," I, § 23; *Windscheid*, "Pand.," §§ 29, 135.

itself, it can be found always to constitute in fact a limitation on some precedent imperative, to which it really refers. To return to an example already given, when something called self-defense is permitted,[36] the law does nothing more than limit the imperatives which forbid personal injury, by negativing their force in certain cases in which bodily harm may be inflicted to "save one's self or another from actual and wrongful violence." Without reference to the general prohibition of criminal law, this provision would be absurd.[37] And likewise in civil law: when the Italian Civil Code allows a trustee to renounce his trust,[38] it only negatives in that case, under given conditions, the imperative concerning the fulfillment of contracts.[39] Thus the legal permission of non-payment of gambling debts presupposes a general command to keep agreements.[40] If no norm imposes this last obligation, the permission would be superfluous and incomprehensible.[41]

§ 122. *All Juridical Norms are Reducible to Imperatives.* In the end we must hold, as we have said repeatedly, that every juridical proposition tends to safeguard a possibility of action by the exclusion of other

[36] Cf. Ital. Pen. Cod., Art. 49, n. 2.

[37] This is true of private persons as well as of the departments of the State, to both of which the norms refer. The belief that juridical norms affect only the organs of the State was rightly refuted by *Merkel*, "Elemente der allgemeinen Rechtslehre," 1, § 6.

[38] Ital. Civ. Cod., Art. 1761.

[39] Ital. Civ. Cod., Art. 1128.

[40] Ital. Civ. Cod., Art. 1802.

[41] See *Thon*, "Rechtsnorm und subjectives Recht," p. 292 et seq., 345 et seq.; *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Zw. Th., §§ 130, 135; *Schuppe*, "Der Begriff des subjektiven Rechts," p. 19 et seq. Many permissive rules in the codes can be explained conceptually by a reference to prior prohibitions; they are, so to speak, historically justified.

possibilities incompatible with it. From this it follows, as Pernice [42] and Merkel [43] have shown, that every imperative juridical proposition contains a permission, and inversely, every permissive juridical proposition contains a command.[44] Even those who deny that the element of coercion [45] is essential to law admit in general that, since law controls acts, it must in some manner or form be imperative. The arguments of Zitelmann and Binding are not sufficient to overcome this belief. Although a command or prohibition does not appear in every maxim of law, and although many legal rules are permissive or declaratory in indicative form, yet upon accurate analysis of any juridical proposition there will always be found as a juridical residuum one or more independent or dependent imperatives.[46]

[42] In "Zeitschrift für das privat- und öffentliche Recht der Gegenwart," Bd. VII, p. 478.

[43] "Elemente der allgemeinen Rechtslehre," p. 8.

[44] Thus, for example, the laws establishing freedom of assembly, of the press, of religion, besides abrogating prior prohibitive laws (which implies an imperative value), also imply a command to some State department not to interfere (at all or within certain limits) with the realization of these activities.

[45] Cf. Cap. V, post.

[46] See *Bierling*, "Zur Kritik der juristischen Grundbegriffe," p. 289 et seq., p. 307 et seq., 334 et seq. Thus can be answered those (for example, *Bülow* in "Archiv für civilistische Praxis," Bd. XLIV, p. 37, n. 23), who deduce arguments against the theory of the general imperative nature of law from the existence of dispositive norms especially in the matter of civil procedure. No one denies that many juridical propositions (strictly speaking, all) contain permissions and authorizations, but it is claimed that these imply or define a command or prohibition, or, in other words, that law can only give a permission on the strength of a corresponding command. The same can be said of the observations of *Thöl* in his "Grundsätze des deutschen Privatrechts," p. 103, n. 1, where he upholds the utility of permissive norms because it is, he says, "often hard to know what I can do and what I should leave undone." But, it is not the

§ 123. *Permissive and Non-Prohibitive Juridical Norms.* The question can arise in another form when there is a distinction of permissive and non-prohibitive norms. Wach has attempted to make such a distinction.[47] He thinks that the absence of a prohibition does not make an act permitted, but that for an act to be permitted it must accord with the positive will of the State; a particular "permissive sanction" or, as he says, "recognition by the State," is needed. The consequence of this would be, as Bierling points out, that while the walk of a prisoner through the prison yard could be called permitted, the walk of citizens along the highway would be neither prohibited nor permitted. As the practice of moral virtue is in general not especially sanctioned by law, it could not be called permitted, but only non-prohibited. This is not only contrary to the general opinion, but also probably contrary to Wach's thought as well. Should we, therefore, in such cases, speak of recognition on the part of the State? But in what can this consist except in an absence of prohibition? How can permission be given legally except by a negation of prohibition?[48]

existence or importance of permissive norms which is under discussion here, but their logical nature. It has also been pointed out in opposition to the above theory that legislation only sanctions and defines what has been decreed by custom. But, on this score, it is obvious in the first place that if custom is prior to law, it must have an imperative character (for it could not have juridical value if it lacked "opinio necessitatis"). In the second place, we must add (following Bierling) that legal sanction and definition of a custom are not conceivable except where there is a command of future observance of the usage. The imperative exists, therefore, in this case.

[47] In the critical review of *Binding's* "Die Normen und ihre Uebertretung," in "Gerichtssaal," Bd. XXV, p. 443.

[48] See *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Zw. Th., p. 316 et seq. The plan of Wach's thought is easily understood — he does not want law to appear to cloak bad acts, even if

§ 124. *Juridical Norms Control Acts.* In considering the constitution of juridical norms, we must always bear in mind that they do not create the activities of the agents, but merely control the acts instituted by them in the many explications of reality and potentiality.[49] A norm which simply affirms the existence of

for some reason it cannot repress them. He writes: "The State does not prohibit much, because it does not find sufficient grounds for penal or other legislation, but it abstains from giving a permissive sanction. A wrongful act as such is never permitted by the State and is never in accord with the positive will of the State, though it may not be forbidden." But in this statement he (and all those also who share his opinion) attributes a function to law which does not properly belong to it. Not the reality of ethical acts but (as we have shown hitherto and as we will make clearer in the following pages) their possibility in the relations between several agents constitutes the specific nature of law. The ethical characterization of law, which is not proper, is, too, one of the errors in Rosmini's juridical system. The desire not to recognize a law morally bad was the cause of the uncertainties and inconsequences of his doctrine, which are seen in the frequent distinctions and subdivisions (which should make for clearness) between simple and true law, between crude and fully-developed law, between what one has a right to do and what others should think he has the right to do. (Vide "Filosofia del diritto," Vol. I, esp. at p. 140 et seq., 158 et passim.) As we have shown before, we hold that conformity to law does not mean subjective conformity to an ethical principle, but only action in such a relation with an ethical principle, which forbids any act by any other agent which would prevent its effectuation. This freedom from hindrance shows its possibility in the objective ethical order. Hence it is that the legality of an act does not prevent its valuation by a subjective ethical test, that is, by morals "stricto sensu." The criteria of Rosmini and Wach, regarding the special will of the State in special cases, may perhaps be applied to this judgment. But such will cannot be immediately determined from the law, but must, on the other hand, be induced from the reason which produces it, in other words, from the general ethical principles which govern the life of society.

[49] It seems that *Jellinek*, "System der subjektiven öffentlichen Rechte," 2d ed. (Tübingen, 1905), p. 47, errs when he states that

a natural possibility has no juridical significance. Its juridical value is commensurate with its control of physical power, by which certain conduct (commissive or omissive) possible by nature is prohibited. From this the imperative as well as limiting character of juridical norms is seen; what is not counter to them is in accord with them. There is no neutral zone, "tertium non datur."

"the systemization of law can increase the number of capacities of individuals above that given by nature." For even the most complex juridical relations and specific consequences attributed by law to certain acts can in no case be conceived as anything but explications of natural capacity to act either on the part of the agent himself, whose right is under consideration, or of others whose relations with him are determined by law. Natural capacity cannot be created nor in any way increased by means of juridical norms.

# CHAPTER IV

## RIGHTS

RIGHTS CONSTITUTE THE JURIDICAL SPHERE OF THE INDIVIDUAL. — RIGHTS AND DUTIES. — JURISTIC CAPACITY. — RIGHTS ARE BILATERAL. — RIGHTS SHOW THE POTENTIALITY OF ACTION.

§ 125. *Rights Constitute the Juridical Sphere of the Individual.* Now our way is clear to define the concept of rights. Heretofore we have shown that juridical norms, by their imperative nature, affect the natural practical capacity of man, by prohibiting (opposing a contrary will to) certain of his possible acts of commission or omission. From this it is clear that while certain acts cease "per tantum" to be possible juridically, the possibility of others, "per ipsum tantum" are reaffirmed and re-enforced. In other words, they have a place in the scheme of rights and constitute an agent's juridical faculty or power.[1] This faculty is bounded by the existence of norms limiting the acts which are physically possible to an agent. If the norms were done away with, there would be no faculty in a juridical sense. The juridical faculty is usually likened to a circle or sphere, in which an agent is free to act.[2] As to this, it

[1] Acting within these limits is, however, not only possible but necessary (juridical duty). The specific character of this duty cannot appear with full clearness until it is contrasted with that element of claim or "Anspruch," which one will consider as an essential of law in the text, § 127 et. seq., post.

[2] For example, *Merkel*, "Elemente der allgemeinen Rechtslehre," I, § 1, 4: "Law creates this order inasmuch as it limits the sphere of action of the members of the community in relation to each other

is important to note that juridical imperatives are generally conditional, that is, they generally require a certain amount of facts for their effective application.[3] These required circumstances are usually external and physical (chief among which is the requirement of a living agent, which is too obvious to merit especial notice save in the abstract), and refer to certain natural conditions of things, for example, the attainment of one's majority. Others (which are of particular importance in determining juridical relations) consist in expressions or acts of will, either of the agent, to whom the faculty is given, or of some one with whom he is in relation. The actual juridical sphere of an agent varies from moment to moment. And, therefore, if we wish to preserve the classical simile and represent rights in their objective synthesis as a circle or sphere, we must not forget that it is far from being constant and fixed for any given agent, but is of different radii, enlarging and constricting about him with the change of subjective and objective conditions,

and to the whole." *Lasson*, "System der Rechtsphilosophie," p. 207, "Legal rules draw a line which must not be crossed; on this side lies the sphere of legal power." *Pernice* in "Zeitschrift für das Privat- und öffentliche Recht," Bd. VII, p. 474 et seq., "The result (of juridical rules) is always the creation of a sphere, and within it every one is a free practical agent." Thus *Pachmann* in "Ueber die gegenwärtige Bewegung in der Rechtswissenschaft," p. 45, defines rights as "the measure of human freedom in society."

[3] Thus *Ihering* in "Geist des römischen Rechts," I, p. 57, "This form ("when . . . . then") is the most simple and direct and underlies every legal rule, even when it is not an external feature of it." Cf. "Der Zweck im Recht," I Bd., p. 350. Also *Zitelmann*, "Irrtum und Rechtsgeschäft"(Leipsic, 1879), states that every legal maxim is an hypothetical judgment. And yet we must note that this principle has its exceptions, especially in constitutional and administrative law. See *Merkel*, "Elemente der allgemeinen Rechtslehre," 1, § 3, 3; and especially *Binding* in "Die Normen und ihre Uebertretung," 1 Bd., p. 124 et seq.

both of which, turn and turn about, affect the applicability of juridical norms. This is true entirely independently of the change which the norms themselves undergo.

§ 126. *The First Characteristic of the Juridical Faculty.* The juridical faculty or sphere of action at any given moment presents this characteristic: — its content, that is, the whole possible activity or abstention of an agent, untrammelled by juridical imperatives applicable to him, cannot be controlled by another agent without such control [4] being opposed by the same imperatives by which the first agent's activity was circumscribed. This property is a necessary result of the nature of the juridical faculty or power. It is limited by that activity or abstention which everyone should have under the imperative norms imposed upon him. Whatever, therefore, is demanded of him, that is, whatever stricter limitations are placed on his positive or negative exercise of activity than those decreed by the existing system of norms, infringes the system. Clearly (as we have said) in certain cases one agent's will can be a basis for the applicability of certain norms to another agent. But as this always arises from the norms themselves, so it finds its limit in them. Now, we can see the characteristic and really constitutive element of juridical faculty, by which it appears strictly connected with the juridical norms. An agent's activity is juridically protected [5] to the extent that it is limited. Juridical respect (understood in the broad sense, as including eventual positive claims) is always inherent in every one, and is determined by his rights. Hitherto we have examined the juridical

[4] It must be remembered that this word is used only to designate the objective actualization of will incompatible with the others given.

[5] *Cicero* was right in the strictest sense of the word, "Legum servi sumus ut liberi esse possimus."

faculty in both its logical phases, which come, however, from a single causal reason. One (which can be called the internal side of this faculty or right) represents the potentiality of an agent to act in conformity to and within the bounds set by the imperatives. The other (or external side) denotes the impossibility of interference and the power of reaction against it, under the imperative which gave the first power.

§ 127. *Correspondence of Rights and Duties.* This correlation, essential to the notion of rights, shows how every right has a corresponding duty.[6] The claim to

[6] So, for example, *Merkel* says in "Elemente der allgemeinen Rechtslehre," II § 21, "Rights are the power of one man in his relations with others. There is no right to which a legal duty on the part of another does not correspond." *Roguin* in "La règle de droit," p. 76 et seq., expresses the same idea, stating that there cannot be a right without a man duty-bound to submit to it. *Bierling* is wrong, when he holds in "Zur Kritik der juristischen Grundbegriffe," Zw. Th., p. 52 et seq., 324 et seq., that there can be liberty "(Dürfen") or power ("Befugniss") without a claim over another ("Anspruch") and, therefore, a corresponding duty ("Pflicht"). In no way can a practical power or right be given without the illegality of its interference being determined by the same system. Bierling's examples, however ingeniously chosen, cannot destroy this principle. According to him, the position of the finder of a "res nullius" could be distinguished from that of an owner, because he would have a simple power or right over the thing without any claim over others. But the truth is that the right to take possession of a "res nullius" includes the duty on the part of others not to oppose the occupancy, except the case of a previous occupant (in which case it is not "res nullius"). As to the right to use something, represented as existing prior to occupancy, it does not exist in fact, but is based on the implied hypothesis of future occupation, and is referable, therefore, logically and juridically to property, which is acquired thereby. So all Bierling's examples are founded on equivocations. If one speaks generally of everyone's right to lead his life without interference, one limits the right by the definition, and the limit lies exactly where one's acts can be legally opposed by another's. Other obstacles cannot be put in its way, that is, the sphere of one's right cannot be invaded;

respect (the German "Anspruch" and Italian "pretensione") is in fact a part of every right. Its value is seen in different guises and phases which deserve separate and distinct consideration. In the first place, this claim to respect is, so to speak, latent, that is, it enjoys only a potential existence. Until the legal faculty is exercised by some one, while no one is deprived of his rights, the protection against possible transgression has no occasion for concrete manifestation.[7] When there is a threatened or actual violation of an agent's sphere, his right or the objective strength of his rights effectively opposes the acts of him who threatens or effects the infringement. An actual juridical reaction takes place which can be regulated by new imperatives, presupposing for their applicability the infringement of the first.[8] The essence and essential object of such reaction is the prevention of the transgression. Where this is not possible, or, being possible, is insufficient, other supplementary consequences, in the generally typical forms of indemnification in damages or of penalties, are inflicted.[9] The concrete and technical expression of a claim lies in juridical complaint, that is, in actions ("Klagen"). This is not, however, the only form of the objective demand

herein lies a true right ("Anspruch"), and, therefore, in this case, too, there is a correspondence between juridical duty and power. Analogous arguments can be adduced for the other cases advanced by Bierling (p. 325 et seq.).

[7] It is hardly necessary to point out that ordinarily the virtual existeno of juridical reason is sufficient to create this respect, upon which it is based, and which exists for other motives besides the fear of punishment. Cf. *Filomusi-Guelfi*, "Enciclopedia giuridica," p. 26 et seq., and Cap. V, § 134, post.

[8] There are cases where the juridical reaction against an offense is effected not by the application of new norms but by the suspension of others hitherto effective. An example is the law of self-defense.

[9] Cf. § 136, post.

of rights in general. In public law particularly, extra-judicial forms of resistance can frequently be opposed to eventual violations.[10] Even in private law the violation of certain rights can "per se" produce consequences which show in regard to the offense a true and actual juridical reaction against the offender. But, especially in progressive juridical systems, a future remedy generally prevails over the prejudicial protection and potentially upholds it. Thus, with this reservation, actions at law are the typical if not the only expression of rights—their external side.[11]

§ 128. *Legal Capacity.* An agent's legal faculty or power takes on a particular force when it not only acts thus and so, but lends definite juridical effect to certain acts. In technical phraseology, this is called legal capacity.[12] The juridical faculty is not formed by it, but, once formed, is raised, in a certain sense, to the second power. An agent's incapacity to perform certain acts does not "per se" imply that their fulfillment does

[10] Cf., on this point, *Orlando*, "Teoria giuridica delle guarentigie della libertà," in "Biblioteca di scienze politiche," Vol. V. (Turin, 1890).

[11] The belief that the right to a remedy is a new right born of the violation of the antecedent right has some historical foundation, especially as regards Roman law. It was upheld by Savigny in his "System," §§ 204, 205. But generally in modern law the remedial right is not considered as the product but as the expression of the antecedent right. This theory, which may be called the dominant theory, has been treated by *Windscheid*, in "Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts" (Düsseldorf, 1856), and in his "Pandekten," § 44 and n. 5, also the notes in the Italian translation Vol. I, Pt. I., p. 680 et seq. See *Chiovenda* "L'azione nel sistema dei diritti" in "Saggi di diritto processuale" (Bologna, 1904); *Brugi* "Istituzioni di diritto civile italiano," § 31.

[12] Cf. *Brinz*, "Pand.," 1 ed., § 52, p. 175; 2 ed., § 65, p. 211; *Bierling*, "Zur Kritik der juristischen Grundbegriffe," § 147 et seq.; *Jellinek*, "Syst.," p. 47 et seq.

not lie within his legal sphere. For example, a minor is guilty of no wrong who accepts a loan or enters into any other obligation. So the law, to take the example adopted, decrees in such a case only the invalidity of the act, that is, deprives it of the results it would have had if done by a person of full capacity. Legal capacity, therefore, does not exhaust the concept of rights. It is only a secondary complication or internal differentiation. Our previous remarks are of value, however, in considering its fundamental significance.

§ 129. *Rights are Bilateral.* Thus, in rights the potentiality to will or act implies a claim on another, to which he is subjected; in a word, that rights are essentially bilateral is a logical truth, deducible, as we have seen,[13] "a priori," and therefore applicable to every form of right. Particular emphasis must be placed on this notion in relation to rights in things as distinguished from rights of obligation. Thus the legal idea of property, the principal and typical right in things, presents a double aspect. On one hand, the owner as such enjoys the possibility of control of the thing (within the limits established by legal norms), on the other hand (still because he is its owner), he may demand non-interference with his activity expended on it. There is a somewhat widespread belief that the second element is sufficient. Thus, Windscheid states that property rights involve a "simple prohibition," and that the volitive content of rights in property is negative.[14] Thon [15]

[13] Cf. § 111, ante.

[14] "Pand.," § 38 and n. 3. Cf., however, § 167 and n. 1, where the force necessary to preserve the negative configuration in opposition to the reality of the relation is evident. We may point out besides that in the earlier editions of his treatise, *Windscheid* expressed a contrary opinion. See notes of Italian edition (Turin, 1902), Vol. I, Pt. I, p. 545 et seq.

[15] "Rechtsnorm und subjectives Recht," p. 154 et seq.

develops this view to the full, asserting that property rights consist in a legal prohibition of control over a thing by any save him who has the title. Only after a violation of this right, giving rise to a claim[16] on the part of the owner, can we speak of his right.[17] But the prohibition of violation or power of reaction against such a possible act is only the external side of a right.[18] The right of legal action to prevent violation is given inasmuch as there is the possibility of acting within the limits of law before violation. Both the right in the thing and the right to non-interference are equally essential to the concept of property rights. Both are needed for its true determination. Those who, following the traditional formula, base the definition on the relation of fact between the owner and the thing, proclaiming

[16] Thon's conception that an owner of a right has no claim ("Anspruch") before its violation is upheld by reference to rights in things, also by *Neuner*, in "Wesen und Arten der Privatrechtsverhältnisse" (Kiel, 1866), p. 153 et seq., and *Brins*, in "Pand.," 2 ed., p. 251 et seq. They affirm in substance that there can be no claim or demand without a definite person on whom it is made. This is, of course, true of an actual claim, but, as we have said, the juridical demand of respect ("Anspruch") has a potential existence from the moment of the creation of the right, of which it is an integral part. In such a sense there is no difficulty in an abstract conception. Cf. *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Zw. Th., p. 176 et seq. It must be admitted, however, that the eventual violation actualizing this claim gives it the specific form which (as *Windscheid* in "Pand.," § 43 says) constitutes its personal direction.

[17] *Schlossmann* in "Der Vertrag" (Leipsic, 1876), p. 257 et seq., expresses an analogous doctrine that property is purely negative. "Property rights," he says, "are only the common apparent source of a claim over others concerning the thing itself." Also *Bierling*, in "Zur Kritik der juristischen Grundbegriffe," Zw. Th., p. 181 et seq., makes property law consist in the right of non-violation.

[18] Cf. *Bekker*, "Allerlei von dinglichen Rechten" in "Zeitschrift für vergleichende Rechtswissenschaft," Bd. II, p. 17 et seq.

the so-called "immediate ownership,"[19] and those who, restricting the outlook in the opposite sense, reduce their rights to a simple prohibition of interference, are equally in error.

§ 130. *Rights Show the Possibility of Action.* To make the nature of rights clear, we will add one more observation. If rights consist in the power to act without foreign interference, and we so define them, we do not meet the objection which lies in all the definitions based on the element of will as actual, that is, on the effective force or control of the will. Such is substantially the theory of Windscheid, who thinks that a right is only a "Willensmacht" or "Willensherrschaft," protected by law.[20] But he does not succeed in overcoming the difficulty which he himself raised, referring to an attack by Thon.[21] The substance of rights is independent of the actual will of the owner or of any manifestation of will on his part. Whoever is guilty of trespass "quare clausum fregit" violates the landowner's rights, although he has been passive. Whoever does not

[19] Contrary to this conception of property rights, which represents property as a claim on things (cf. *Neuner*, "Wesen und Arten der Privatrechtsverhältnisse," p. 50 et seq., esp. p. 53) are *Kant's* observations in his "Met. Anfangsgr. d. Rechtslehre," p. 80 et seq., and those even more concise of *Fichte* in his "Grundlage des Naturrechts," p. 53: "It is futile to talk of a right over nature, over grounds, over animals, simply as such, considering only the relation between them and man. The mind exercises a control, but no right over them, for there is no question of law in this relation. When another man and I are interested in one thing at the same time, it is a question of property law, to use the abbreviated phrase, but it should really be called the law of human relations for the exclusive use of one thing." The fundamental truth of these critical arguments has received endorsement in the analyses of subject by *Petrone* in the "Contributo," p. 348 et seq.

[20] *Windscheid*, "Pand.," § 37.

[21] "Rechtsnorm und subjectives Recht," p. 220 et seq.

pay his debts violates the rights of his creditors, although they have not demanded satisfaction of their claims. A minor, or anyone under some legal incapacity, has rights regardless of whether he has a guardian."[22] A man can have a right even without knowing it, Thon added even against his will. What we have recognized as essential to rights is not the effective will nor its actual control, but its possibility and therefore the possibility of its control under established norms.[23] The example cited proves this.[24]

[22] "Denn diesen (willensunfähigen Rechtssubjekten) sprechen wir schon Privatrechte zu noch ehe ihnen ein Vertreter gegeben worden ist," are *Thon's* exact words. "Rechtsnorm und subjectives Recht," p. 220.

[23] *Binding*, "Die Normen und ihre Uebertretung," II Bd., p. 50, n. 75, thinks it would be more proper to speak of an agent's acts than of his will. The remark is due to the restricted conception of will, which we have shown to be wrong in § 87 et seq., supra. When the word will is given its true meaning, it is synonymous with act.

[24] In them the possibility of willing in accordance with the content of a right (by means of him who has the right or of his present or future representative) is coextensive with the right. The difficulties in the case where he who has the right is under a legal disability is only superficial, for if the will of the trustee or guardian were not considered as that of the cestui que trust or ward, the right would not belong to the latter. It is clear, therefore, that he who has, or is thought to have a certain possibility of willing is necessarily he who has the right.

# CHAPTER V

## LAW AND COERCION

ALL LAW IS COERCIVE. — COERCION AND COMPULSION. — APPARENTLY UNCOERCIVE LAW. — POSSESSOR OF RIGHT AND WIELDER OF COERCION.

§ 131. *Law is Coercive.* From our previous study of the nature of the juridical criterion, it can be seen that action is objectively possible to the extent to which it conforms to law. The objective possibility means only freedom from possible prevention, which is the result of juridical approval, while moral approval, by decreeing a corresponding omission, on the other hand, supposes the antithesis. In consequence of this fundamental concept of rights, juridical possibility is always accompanied by a claim ("Anspruch") against another, that is, the right to demand a positive or negative act on his part in regard to the right itself. If such correspondence of reciprocal conduct, decreed by law, is not observed, he who disregards it exposes himself to restraint, since such restraint lies within the juridical sphere of him whom he has injured. This logical relation exists in every possible case, because it is fundamental to the juridical consideration of human action. Taking acts objectively, that is, opposed one to another by their different agents, no ethical qualification is possible which is not in inverse ratio to restraint. Law is synonymous with the juridical possibility of the repression of wrong. In this way the vexed question of juridical coercion should be solved. In other words, it should be recognized that the possibility of enforcing the observance

of a right is an integral and characteristic part of the right itself. From the time when Thomasius pointed out that compulsion was the distinctive factor which distinguishes the "justum" from the "honestum" and "decorum," this concept, far from being forgotten, has always played an important part in the theory of law.[1] Kant confirmed it absolutely, saying: "Law and faculty of constraint are one and the same."[2] Thibaut, following this concept, gave a simple definition of law: "Law is that which permits the possibility of coercion."[3] There would be no need of pursuing further the subject of the necessity of compulsion in law were it not that many serious arguments have been advanced against it, particularly by modern jurists. The inexact way in which rights have been conceived is largely responsible for this, and, therefore, we must review these arguments to find their value.

§ 132. *Limits of Coercion not a Proof of Uncoercive Law.* The first general argument against the essentiality of coercion to law is: However extensive the presence of coercion in the juridical field, yet there is always, from the nature of things, a point beyond which its application does not extend. It is co-extensive with the power which exercises it; he who exercises coercion clearly cannot be subject to it. This argument is worthy of attention, because it is directly based on principle. As in retracing the causal chain a point is reached which must be considered as causal but not caused, so in the legal order there must be the rule of ἀνάγκη στῆναι; the possibility of coercion has limits fixed by nature. "The nature of the supreme power makes it

[1] Cf. on this point, *Stahl*, "Geschichte der Rechtsphilosophie."

[2] *Kant*, "Met. Anfangsgr. d. Rechtslehre," p. xxxvi.

[3] Cited by *Ihering* in "Geist des römischen Rechts," Dr. Th., I Abth., p. 317.

unrestrictible," writes Rümelin.[4] Jhering reasons in the same way, although he holds that compulsion is essential to private law: "At a certain point, in coercion by the State the 'being compelled' must find an end, and then remains only the compelling."[5] Binding writes in the same tenor: "If he who has the monopoly of power ("der Zwangsmonopolist") refuses to exercise it, who can make him? How can a right against the State be enforced?" No one can be said to coerce himself."[6] These writers, like many others, think only of the juridical position of the sovereign, who, constitutionally inviolable and irresponsible, cannot be compelled to fulfill his duties.[7] The question, treated broadly, includes the fundamental problem of all public law. Its solution depends upon the conception of the relation between the State and its citizens. The arguments concerning rights on this subject are too well known to need comment.[8] For our purpose,

[4] *Rümelin*, "Eine Definition des Rechts," p. 337.

[5] Cf. *Ihering*, "Der Zweck im Recht," I Bd., p. 327.

[6] *Binding*, "Die Normen und ihre Uebertretung," I Bd., p. 483 et seq. Cf. p. 63 et seq.

[7] Cf. besides those cited, *Thon*, "Rechtsnorm und subjectives Recht," p. xi, 7 and 126; *Geyer*, "Philosophische Einleitung in die Rechtswissenschaften," p. 5, "Undoubtedly juridical duties control even kings (when they are not mere despots), but they cannot be subjected to compulsion." Both writers expressly exclude coercion from the definition of law. This is more strange in Thon, who, as we have seen, is a firm believer in its imperative nature.

[8] The prevalent tendency in Germany, the result of *Gerber's* famous "Ueber öffentliche Rechte" (Tübingen, 1852), does not favor rights against the State. Laws which guarantee certain rights to the citizens are looked upon as limitations on the power of the State, and political rights (*e.g.*, that of suffrage) are conceived of more as public functions than as true rights. But the theory which admits such rights is well represented in Germany and is prevalent in France and Italy. Bibliography, *Ranelletti*, "Facoltà create dalle autorizzazioni e concessioni amministrative" in "Rivista italiana per le scienze giuridiche," Vol. XXII (1896), p. 202 et seq.

however, we can reduce the discussion to the following terms. When can a right against the State or against the supreme coercive power of the community be allowed? We can reach the conclusion that the possibility of coercion is not essential to a right only if we can find such a right existing without the possibility of coercive realization. But, to avoid grave error, we must remember that the discovery in the juridical scale of a point not attainable by coercion has no evidential weight in our discussion. Perhaps at such a point the scale ends, and no one has a further true right. There is no doubt, however, that the existence of every juridical system is based on a supreme power, by which all the rights in the system are enforced. The result of this is that within the system there can be no right without its recognition. Let us turn back and now consider rights against the State or against the supreme coercive power of the community. Clearly there is but one alternative; either they will be recognized by the State and a method be provided for their realization, or they will not be so recognized and not be true rights in respect to the State, but a mere demand, the compulsory realization of which would not be in harmony with the system. An extra-legal claim can never be considered a right. It could only be so considered if it were referable, in the face of the juridical system of the State, to some other system of law or supreme principle, by which it might be compulsorily effected. From this it is clear that the theory we have given cannot lead to an exception to the principle of the

Cf. *Jellinek*, "System"; *Esmein*, "Éléments de droit constitutionnel français et comparé," 3 ed. (Paris, 1903), especially p. 377 et seq.; *Green*, "Lectures on the Principles of Political Obligation," p. 142 et seq.: *Romano*, "La teoria dei diritti pubblici subiettivi" in "Primo trattato completo di diritto amministrativo italiano," Vol. I (Milan, 1900), pp. 108–220; *Giese*, "Die Grundrechte" (Tübingen, 1905).

essential coerciveness of law.[9] Let us now consider the special example chosen by the writers we have quoted, that is, the juridical position of the sovereign. Abstracting from the various circumstances and from the meaning of the responsibility of the ministers in relation to the irresponsibility of the crown, this dilemma arises: Either the law which sanctions the inviolability of the sovereign works independently of the laws which impose obligations on him, or it is effective only while the latter are observed and his inviolability is really subordinate to his duties. Accepting this second thesis (of which we find many clear examples both in abstract political theories and in positive historical constitutions), all the logical characteristics of law are present, the claim, potential or latent until the satisfaction of the right, would appear in the moment of its violation. The principle of the coercibility of law would have an exact application. Or else, taking the first thesis (which is the opinion of the writers quoted) and admitting that the inviolability remains despite broken obligations, the conclusion is plain: norms, which impose unenforceable obligations, whose eventual disregard cannot be legally opposed, have as legal imperatives[10]

[9] *Binding*, in "Die Normen und ihre Uebertretung," I p. 487 misses the crux of the question when he writes, "The State has not only a right but also a duty to punish, but this duty is incoercible." This would be in point if such an office of the State were a judicial duty or if it were the object of a claim ("Anspruch") on the part of anybody. If this is denied (as it is by Binding himself) the juridical duty to punish is denied. The same answer may be made to the other arguments of the same writer. A German citizen, he says, has a right to protection in foreign lands; if the State refuses to protect him, who can coerce it? This is a "petitio principi"; if the State can refuse to protect him, he has no right to protection. If the refusal is illegal, that is, if it is against a law of the State, which gives a citizen a right to protection, his right would be enforceable by the means given by the law.

[10] *Kant* reached this conclusion, which is the only logical one, Thon, Binding and Geyer to the contrary notwithstanding. He

no value. We may further point out that an intermediate condition is possible when the king, while preserving his inviolability, has his sphere of action so determined by law that within certain limits it is juridically possible by means of other organs of State to resist or oppose his eventual transgressions of his duties. This is the system of constitutional monarchies, in which the king has imperfect juridical duties [11] — imperfect in that the means to prevent the transgression are indirect or lacking.[12] In all events, the correlation between the two terms remains uncontrovertible; whenever there is a right, there is the juridical exigency of non-interference.

§ 133. *The Fact that the Possessor of the Right does not Exercise the Coercion "in Propria Persona" is not a Proof of the Uncoerciveness of Law.* Another argument against the coercive nature of law (directly connected with the one just refuted) is based on the fact that the possessor of a right does not generally enforce it himself.[13] The State does this by one of its departments. But it is obvious in the first place that the question of who exercises the coercion has nothing to do with the matter before us. What we are considering is that the right is enforced and that it shows its effectiveness by coercion. In certain cases, where public authority cannot intervene in time, the victim of aggression can defend himself. That these cases of private protection, which were so frequent in primitive régimes as to be the rule,[14]

expressly affirmed that the head of a State has no juridical duty, and there can be no legal resistance to his illegal acts. "Met. Anfangsgr. d. Rechts.," p. 203 et seq.

[11] Cf. § 137, post.

[12] Cf., on this point, *Jellinek*, "System," p. 349 et seq.

[13] Vide *Hölder*, "Pand.," § 4, p. 18 et seq.

[14] Cf., on this point, *Bernhöft*, "Ueber die Grundlagen der Rechtsentwicklung bei den indogermanischen Völkern" in "Zeitschrift für vergleichende Rechtswissenschaft," II Bd. (Stüttgart, 1880), especially p. 285 et seq.

have disappeared one by one so that in progressive juridical systems they have become exceptions to the general rule, is due to the increase of legal protection. It seems an error to say that a citizen cannot compel the State to interfere to protect his rights, which can only be enforced by means of the State. What is a right except the power to demand of the State what it recognizes as such? How can we make two rights of what is really only one, whose recognition includes enforcement by the State? We can also admit that in the positive order of things the organs of State can sometimes wrongfully refuse to recognize claims. But, as legality in a determinate system is subject to such recognition, the legality disappears when the recognition is denied, and so the act cannot be a fully developed right and lack means of self-assertion. Clearly a citizen cannot coerce the judiciary into a recognition and enforcement of his right, but, let us repeat it once more, such recognition is presupposed when, in a positive system, a right is spoken of.[15] From this we can conclude that this second objection, like the first, has no weight in weakening the position of the coercive principle of law.

§ 134. *Spontaneous Observance is no Proof of the Uncoerciveness of Law.* The argument against the coerciveness of law, which we will now examine, differs entirely from the last two. It is not only upheld by

[15] "A right in its true sense," writes *Carle* in "La Filosofia del diritto," I, p. 87 et seq., "cannot be drawn from one of its opposing terms, and therefore neither the *Declaration* nor the *Plea* or *Answer* show it in its integrity. The *Opinion* of the judge, chancellor or referee expresses it more accurately. The plaintiff and defendant have rights, one to bring suit, the other to defend it, but neither has a right to a judgment in his favor. The law is expressed by the judgment, as the price in a sale is shown by the agreement of vendor and vendee, and not by the excessive demand or shabby offer."

good authorities, but the principle upon which it relies is certainly true. Law is by its nature a vital force and as such dominates the wills of those subjected to it, but its realization is not always mechanical. Psychological coercion is as effective as the physical. And where it is sufficient, the true ends of law are better attained and realized by it. Indeed, when in the majority of cases one cannot count on spontaneous obedience, it cannot be said that a system of law really exists. The increasing adaptation of men, moreover, to conditions of social co-existence leads us to imagine a future state in which laws will always be obeyed and respected for themselves, without need of coercion. And yet, in such a case they would nevertheless be laws. Such in substance are the reasons advanced by Merkel,[16] which were followed, at least partially, by Ahrens,[17] Trendelenburg,[18] and Bierling.[19] In fact, no one can deny that legislators favor spontaneous obedience. And the origin of law in custom shows that it is a natural characteristic of law. But this does not meet the real difficulty of the question, for it does not consider the true terms. What we must fix our attention on is this: Is a possibility of physical reaction against the infringement inherent in a right? That law is always violable is a point not to be lost sight of, and one which we have already deduced as essential in our earlier analysis of juridical criterion.[20] The question of the coerciveness of law is properly reducible to

[16] *Merkel*, "Elemente der allgemeinen Rechtslehre," I, Cap. I, § 7.

[17] *Ahrens*, "Naturrecht," I Bd., § 37, p. 310.

[18] *Trendelenburg*, "Naturrecht," § 46. Trendelenburg and Ahrens hold that coercion is a secondary or derivative element of law.

[19] *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Erst. Th., p. 139 et seq. Cf. his "Juristische Prinzipienlehre," III Bd. (Tübingen, 1905), "Störung und Bewährung des Rechts."

[20] Cf., § 100, etc., ante.

the question of whether coercive repression can in every case be juridically opposed to a possible violation. If the right is respected, such repression is not exercised. In a social state, where justice is spontaneously realized, the threat of coercion would be a dead letter. So to-day the efficacy of the norms is often shown without the use of coercive means; but all this, while true, is foreign to our discussion. Until the discussion is not based on the hypothetical violation of law, the proposition of coercion is badly stated and cannot be solved. Of course a juridical norm or statute "would not cease to be such, even if the mechanical means of enforcement were generally unnecessary,"[21] but this is far from proving such norm or statute uncoercive, for the fact upon which the use of coercion depends is omitted from the hypothesis.[22] If a juridical system could be described or imagined which did not allow the prevention or repression of possible violations of rights, only then could we be said to have proved that the coercive element is not essential to the concept of law.[23]

[21] Cf. *Merkel*, "Elemente der allgemeinen Rechtslehre," 1, Cap. I, § 7.

[22] For the same reason *Binding* is wrong in thinking that property rights in general are not coercive, except when coercion is required because of violation: "Not property rights, but only the claim of the owner against the detainor or wrongful possessor for damages is enforceable." "Die Normen und ihre Uebertretung," p. 488, n. 3. Of course here, as in all other cases, an effective use of coercion cannot be made before an act of violation, but the possibility of coercion is coincident with the right.

[23] On this point *Schuppe* points out with accuracy, "There is clearly a right, even when a universal constant belief in the necessity of such or such rules of business gives no opportunity for its enforcement or prohibition, and in a certain sense even when those in interest lack the accidental power to prevent its violation. But there is clearly no right when there is no belief in the faculty (allowableness) to prevent the violation." "Die Methoden der Rechtsphilosophie," in "Zeitschrift für vergleichende Rechtswissenschaften," Bd. V, p. 272. Cf., also, *Wallaschek*, "Studien zur Rechtsphilosophie," p. 82 et seq.

§ 135. *Compulsion and Coercion.* In place of compulsion, let us speak only of coercion in our inquiry. The choice of one or the other term is of itself of no moment, save that their distinction marks a diversity of concept, which must be kept clear. What is the precise meaning of the statement that coercion is an essential element of law? If we mean that there is no right whose infringement does not give rise to an act of physical resistance, we are wrong. A law may be violated and meet no compulsory opposition, without affecting the principle under discussion. This principle, to put it briefly, or rather to repeat briefly what has been said, is only this: Where there is right, there is necessarily in the same juridical system the possibility of compulsory enforcement of its respect. Properly, therefore, not compulsion, but coercion, that is, possibility of enforcement, is essential to law. This must be clearly understood before we take up the following objection to our thesis.

§ 136. *Impossibility of Effective Coercion no Proof of Uncoerciveness of Law.* It is common sense that if the will of the legislature tends to the observance of juridical norms, then, where observance does not occur spontaneously, it can hardly be obtained by force. Seldom can legal protection be quick and strong enough to prevent the infringement of a norm. Nine times out of ten coercion comes too late. And before the indestructibility of fact, law, as every other power in nature, must bow. "Quod factum est infectum fieri nequit." This argument seems even stronger in its attack on our thesis when it is considered in its application to concrete cases. By such application, the great number and variety of obstacles in the way of legal coercion are shown. Take the following examples. The rights of a creditor are of no avail against an impecunious debtor. A criminal becoming insane during trial cannot answer for his

crime, or once condemned to death, can murder without fear of punishment for his later crimes. A traveller in a deserted spot vainly claims his rights of his despoilers. A witness cannot be forced to testify, nor can a contractor be forced to carry out his contract (if it involves personal skill).[24] There are two classes of cases (as can be gathered from the examples given) in which effective legal coercion is impossible. In the first are all those in which law cannot act directly but must be satisfied with compensation, that is, by imposing a civil or criminal penalty as a consequence of the transgression.[25] In the second are those cases in which not only direct coercion

[24] Some of these examples are discussed by *Binding* in "Die Normen und ihre Uebertretung," I Bd., p. 489. Cf., too, *Marcadé*, "Spiegazione teorica-practica del codice Napoleone," Vol. I, p. 29.

[25] A penalty imposed for the violation of a statute cannot, as *Thon* says in "Rechtsnorm und subjectives Recht," p. xi, be regarded as coercing its observance. It presupposes the happening of what the statute decreed should not happen. See on this point, *Binding*, "Handbuch des Strafrechts," 1 Bd. (Leipsic, 1885), p. 155 et seq., and "Die Normen und ihre Uebertretung," 1 Bd., p. 35 et seq., and at p. 45 where he writes, "The norm precedes, it is clear, the penal law, which marks a transgression of it with a penalty or declares it unpunishable." He also restates, in company with ancient writers (cf. *Hobbes*, "De Cive.," Chap. XIV, § 6 et seq.; *Puffendorf*, "De Jure Nat. et Gent." Lib. VIII, Cap. 3), the similar formula of Feuerbach, "Betrachtungen über dolus und culpa" in "Bibl. für peinliche Rechtswissenschaft," II, p. 207 et seq, "Thou shalt not will nor do this. This is the primary form of every prohibition, which binds every citizen absolutely and directly." To the same effect, *Heinze* in "Gerichtssaal," Bd. XIII, p. 426, "Every penal statute may be from one point of view characterized as a threat against the failure to observe another and earlier law." Cf. *Bierling*, "Zur Kritik der juristischen Grundbegriffe," Erst. Th., p. 145, "Every penal law presupposes a norm, whose infringment is the terms of the use of the law." Cf., also, his "Juristische Prinzipienlehre," III Bd., V Abschn.; *Schuppe*, "Der Begriff des subjektiven Rechts," p. 21; *Merkel*, "Elemente der allgemeinen Rechtslehre," I, § 5. *Lasson*, "System der Rechtsphilosophie," p. 537, contra.

is impossible but compensation as well. Now, we can show the true meaning of legal coercion. The claim that compulsion is an essential characteristic of law can be destroyed by a single example in which violation is not followed by an effective reaction. But such a claim has nothing in common with our thesis. It is contrary to it in fact. Not actual compulsion but potential coercion is essential to law. Not restraint but the power to restrain, or the right of coercion, is necessarily a part of every law, always dependent, however, upon violation. Although, therefore, circumstances or accidental causes of any nature may obstruct the repressive force of law, or even render supplementary or compensatory damages impossible,[26] the possibility of juridical reaction, which exists immanently in and because of every right, is not destroyed. As the non-existence of a right cannot be inferred from its violation, so the lack of reaction against violation does not weaken the principle that what is contrary to a law is always combatable by that law in some way or another. Notice, we wrote by *that* law. If it were not right to oppose a violation in some way by hypothesis, it would not be a juridical right which was transgressed. Right and the juridical possibility of reaction against wrong are, therefore, two parallel and inseparable and even partially equivalent concepts, the second being only the first considered in its external phase.[27]

§ 137. *Apparently Uncoercive Classes of Law no Proof of Uncoerciveness of Law.* There remains but

[26] In such arguments, *Bekker*, in "Zeitschrift für vergleichende Rechtswissenschaft," I, p. 110 et seq., "Pand.," § 18, p. 47, n. e., finds the grounds for his general objection. He holds that the legal machinery cannot be sufficiently perfected to protect rights absolutely.

[27] Cf. § 126, ante.

one more argument to be overcome: certain juridical spheres seem to lack the element of coercion. The first and largest of these is international public law. In private law, the "leges imperfectæ" and the so-called natural obligations are examples. But, after all we have said, a very few words will clear up this point. In reference to international public law, it is well known that jurists doubt if it is law in the true sense. Lasson denies absolutely that the relations between States have a truly juridical character.[28] The question really is whether such a system of norms exists between States, that their violation implies and gives a right of coercion. It seems that such a system exists, although not yet quite definite and we believe that we have here an example of law in the process of formation.[29] But apart from this, remembering that the juridical possibility of the use of coercion is not subordinate to its physical practicability, the correspondence is shown even here. Nor could it be otherwise, seeing the necessity of the concept upon which it is founded. The solution of the other case is easy. It is evident that when a juridical system restricts the use of coercion within certain limits in a given relation, it restricts the right as well. Take the

[28] Cf., *Lasson*, "System der Rechtsphilosophie," p. 394 et seq., and especially "Princip und Zukunft des Völkerrechts" (Berlin, 1871).

[29] This theory, founded especially on the analogy of the present condition of international law with the primitive stages of national law, is upheld by *Post*, who defines international law as a law "which is becoming" ("ein werdendes Recht"). See "Bausteine," §§ 48, 50, 72. *Vanni*, "Maine," holds the same opinion. Cf. *Del Vecchio*, "Il fenomeno della guerra e l'idea della pace," 2nd ed. (Turin, 1911; German transl., "Die Tatsache des Krieges und der Friedensgedanke," Leipsic, 1913).

[On the subject of international law, its origin, its modern form and development, cf. p. 70 et seq., *Miraglia*, "Comparative Legal Philosophy," § 96.—*Tr.*]

case of gambling debts. "Here," says one, "is an uncoercive juridical obligation, for a suit cannot be brought." But what does this prove except that the creditor's right is restricted to a voluntary payment? The argument against the "leges imperfectæ" is analogous.[30] There can be no doubt that legislative dispositions which establish a command or prohibition and give no coercive reaction against violation are not true juridical norms, and do not constitute true rights.[31]

[30] "Imperfecta lex est," writes *Ulpian*, "quae vetat aliquid fieri et si factum sit, nec rescindit nec poenam injungit ei qui contra legem fecit." "Ulpiani Fragmenta," ed. Teubner (Leipsic, 1886), p. 568.

[31] We have already pointed out in the text, § 116, that the existence in laws and statutes of propositions which have no juridical essence is generally uncontradicted.

# CHAPTER VI

## LAW AND INTERESTS

THE OBJECT OF LAW. — IHERING'S DEFINITION OF LAW. — RIGHTS AND UTILITIES.

§ 138. *Object of Law.* What we have shown so far proves that law by its nature has a practical function. Its determinations, rendering the conduct of several agents compatible, tend to form a system or harmony in society. This harmonious co-ordination of life is not only abstractly outlined, but effected and imposed by law. The juridical imperative, whose diverse aspects we have examined, is co-extensive with the will that forms it.[1] In respect to every juridical proposition or institution, therefore, we should seek the purpose, more or less clearly conceived, and the will which gave it its origin and existence. In the most general philosophical sense, the end of anything is formed by its fully developed essence (so Aristotle in his "Metaphysics"), hence the end or scope of law can be said to be its essence, that is, the ethical co-ordination of the social life. In this sense all juridical propositions and institutions have an equal quality of finality. The formation of a system, the assignment or guaranty of a certain sphere of activity to an agent so that his acts harmonize and do not conflict with those of others—in a word, the pacific compromise of freedom among men living together—such are the teleological characteristics found in every system of law, inherent, in fact, in its concept. But if not content with this definition of the concept itself, we seek the concrete motives and objects which have

[1] Cf. Cap. III, p. 166, ante.

been the causes of the laws, and the specific needs and advantages which have guided the formation of law in its historical course, treating the objects and ends not as a principle of logical determination but as real and effective determining elements, we must disregard the unity of the concept and consider the multiplicity of the contingencies of legal growth and the diversity of positive legal formulæ. Since law arises "usu exigente et humanis necessitatibus," an historical reason, as the real foundation of every institution, will show why law developed thus and not otherwise. Under the form of command or guaranty which protects a right, an active force or concrete exigency of life can be found. But the analysis of such forces and needs, which give the various content of law, cannot be equivalent "per se" to its form, in which its true universality lies.

§ 139. *Ihering's Definition of Law.* Everyone knows what care is used in modern times in the study of the actual coefficients of law. The relativity of positive law to the psychological and material conditions of life receives every day more certain confirmation. There can be no doubt that every institution, no matter how apparently unconnected with the real development of the life of the people who formed it, is always in some way related to it. The fact that the object of custom and law is not discernible at first glance, and is sometimes unknown to the men who are bound thereby, does not affect the actual existence of such an object, which scientific analysis must explain. Tradition, like instinct, diminishes and obliterates the sense of purpose, but, to borrow a phrase of Vico, "the constant and public facts of nations" have always a practical function and reason for existence, which make a teleological explanation possible. There can be no doubt of the admissibility of such a study. The disagreement begins with

the attempt to formulate its results into a definition of the essence of law; that is, with the substitution of a generic definition of the ends sought by law for the declaration of the logical characteristics, which properly constitute its concept. The attempt to overcome or escape such logical deductive research, by the induction of the various teleological relations of law from conditions of human existence, was doubtless due to real progress made in this branch of science; but this does not justify it, when it passes its natural boundaries. We will examine briefly the question of such method of determining the definition of law. Let us take Ihering's doctrine as the most advanced and authoritative of this school.[2] Ihering defines law as "the guaranty of conditions of society in the form of coercion."[3] In another place he says, "law is the complex of the conditions of existence of society guaranteed by the external power of the State."[4] But there is a marked difference between these definitions, for in one, law is the guaranty and in the other, the thing guaranteed. Bierling, because of this, says that Ihering's two definitions cancel one another.[5] We may note that a similar antinomy

[2] For general criticism of *Ihering's* doctrine, see *Petrone*, "La fase recentissima della Filosofia del diritto in Germania," p. 46 et seq. Cf., too, *Pachmann*, "Ueber die gegenwärtige Bewegung in der Rechtswissenschaft," p. 33 et seq.; *Kühnast*, "Kritik moderner Rechtsphilosophie" (Berlin, 1887), p. 25 et seq.; *Aguiléra*, "L'idée du droit en Allemagne" (Paris, 1893), p. 227 et seq.; *Bouglé*, "Les sciences sociales en Allemagne" (Paris, 1896), p. 103 et seq.

[3] "Die Sicherung der Lebensbedingungen der Gesellschaft in Form des Zwangs," "Der Zweck im Recht," I Bd., 1877, p. 434. Cf., 3 ed., 1893, p. 443.

[4] "Recht ist der Inbegriff der durch äusseren Zwang d. h. durch die Staatsgewalt gesicherten Lebensbedingungen der Gesellschaft," "Der Zweck im Recht," 1 ed., p. 499; cf. 3 ed., p. 511.

[5] So *Bierling* writes in his critical review of Jhering's work, published in "Jenaer Literatur-Zeitung," Jahrg. 1878, p. 415, and referred to in "Zur Kritik der juristischen Grundbegriffe," II Bd., p. 59 et seq.

is found in the way Ihering defines rights: "Rights," he says, "are legally protected interests,"[6] but, he adds, right is "the juridical security of enjoyment," or the "auto-protection of interests."[7] There is a lack of clear analysis here for an object protected is very different from protection itself.[8] In all these diverse definitions, however, there is an effort to introduce into the definition the element of scope or purpose, which is thought by Ihering to be the origin of all law.[9] But a subtle equivocation is hidden in this general thesis. Of course, no juridical norm or institution can arise without an object or reason; in this we agree heartily with Ihering that law has a teleological quality; but this does not in the least imply a possibility of discovering a single object for all juridical institutions or norms of all times and of all peoples. The variety of the phenomenal content of law shows a real diversity of criteria, and therefore of the needs and purposes which have a concrete realization in law. It is fallacious, therefore, to attempt to fix the universal object of law, unless one means by this phrase merely the ideal which law should aim to attain according to a particular conception, and does not care to comprehend the whole of

[6] "Rechte sind rechtlich geschützte Interessen," "Geist des römischen Rechts," III Th., 1 Abth., p. 328.

[7] "Die rechtliche Sicherheit des Genusses, — der Selbstschutz des Interesses." "Geist des römischen Rechts," III Th., 1 Abth., p. 338.

[8] This was noted by *Thon*, "Rechtsnorm und subjectives Recht," p. 219.

[9] Cf. "Der Zweck im Recht," Preface. "The fundamental idea of the present work is that Purpose is the creator of the entire law." (p. viii). "All that belongs to the field of law was born of its purpose, was willed by the end to be attained; all law is purpose-begotten, though the separate individual intentional acts may lie so deeply buried in the past that men cannot discover them." "Der Zweck im Recht," 1 Bd., p. 442.

the historical data, or unless one is content in this latter respect with an approximate, incomplete and generic outline, which has the appearance but not the substance of a definition. Every teleological formula, declared as universal, is in some part discordant with reality. For example, there is no proof that in all ages and places the authors of laws have had but one purpose, "the preservation and development of society."[10] The concept of "conditions of existence," upon which Ihering bases the essential reason of law, is extremely ambiguous. It can lead to an optimistic conception of the social régime, which is false to the most elementary critical sense, or it may be identified with any realizable end and, having no precise significance, lose the teleological quality which one is trying to define. Ihering wavers between the various meanings of his formula. He sometimes finds himself in the difficult position of explaining that the most oppressive juridical institutions, clearly suggested by special or class interest, are for the good of all.[11] On the other hand, taking all eudemonological meaning from the words "conditions of existence," he explains them as including all that which can be the object of any aspiration whatsoever.[12]

§ 140. *Criticism of Ihering's Definition of Law.* Furthermore, even if we accept Ihering's belief that "the

[10] This thesis is as unacceptable as the one opposed to it, according to which in no case are the originators of a law moved by the desire of the common good but always by particular interests.

[11] "The advantage of definite constraint over the indefinite." *Ihering*, "Der Zweck im Recht," I Bd., p. 554.

[12] "The pleasures and utilities on which man's life is conditioned, . . . embrace all that may be the object of human struggle and aspiration. The question of the conditions of existence either of the individual or the State is a question of national or individual education." "Der Zweck im Recht," p. 444 et seq. See also how Ihering justifies the prohibition of incantations and sorceries, p. 448 et seq.

guaranty of the conditions of existence of society" is a sufficient formula to determine the actual purpose of law, we must still look to see whether a definition of law is given hereby. Is the determination of purpose always equivalent to that of means? With a definition of the function is that of the functioning organ always given? No one would give an affirmative answer to this question, put thus generally. Even Ihering, speaking of juridical institutions in another work, had to distinguish the teleological from the ontological definitions, and to show that the former is insufficient of itself. We will give this passage in full so great is its importance.[13] "A definition gives the essence of the thing. But what is its essence? Can it be its purpose? So it would seem, for the practical mission which it has to accomplish contains the general motive by which it exists, which makes it as it is and not otherwise. It is, in a word, its logical key. We certainly do not attempt to deny the importance and indispensability for the understanding of the end (not only from the point of view of the philosophy of law, but from a practical standpoint as well), but we contend that juridical theory cannot found itself on the purpose in order to give definitions"; and a few pages later he writes: "We understand by purpose something opposed to content, something higher and above the institution, which is but a means for its attainment." This accurate reasoning sounds like an opponent of Ihering's earlier statements. It is curious to see that Bierling reasons in exactly the same way: "We must not be deceived by the popular tendency to believe that the substance of a thing is contained in its object. No matter how important the knowledge of one is for the understanding of the other, certainly the purpose of any thing or its function in conformity with it cannot be the thing itself.

[13] "Geist des römischen Rechts," Zw. Th., Zw. Abth., p. 364.

A definition of means can certainly not be completed by the designation of the end they serve." In another place Bierling writes: "Insurance against burglary and fire is the object of a safe-deposit box, but a definition of it is certainly not contained in these words." In saying this we do not mean to condemn the propositions that "law is the guaranty of the interests of men," or "a safe-deposit box is good protection for valuable papers," but mean only that such propositions do not satisfy the logical demands of a scientific definition.[14] Analogous criticisms can be made of Ihering's concept of rights, which he bases, as we have seen, on the element of interest. By interest he means the entire content of utility; everything, whether of pecuniary value or not, which can be useful to man; as he expresses it, "all that can be of service to us."[15] Here, too, Ihering's concept is so vague that it throws no light on the object which it attempts to define. Its vagueness prevents its being a scientific definition.[16] If utility can be so broadly defined, no right could be unrelated to it. And it is clear that this utility is of legal consideration, when law recognizes the correlated possibility to will or act by the man to whom the utility is allowed. "Certainly," writes Windscheid,[17] "a juridical system con-

[14] Cf. note 5, p. 209, ante.

[15] Vide *Ihering*, "Geist des römischen Rechts," Dr. Th., Erste Abth., p. 329 et seq.

[16] The different meanings of the word "interest" are given by *Rousseau* in his "Letter" on the question, "S'il y a une morale demontrée, on s'il n'y en a point," in Vol. VII of his "Œuvres" (Paris, 1839), p. 322 et seq. *Pachmann*, in "Ueber die gegenwärtige Bewegung in der Rechtswissenschaft," p. 49 et seq., especially p. 53 et seq., points out that the concept of interest, as understood by Ihering, corresponds to none of the various meanings which the word has in jurisprudence.

[17] *Windscheid*, "Pand.," § 37, n. 3.

cedes rights only for the purpose of satisfying the interest of him to whom it concedes them, yet the purpose of the concession is not part of the definition of rights." "A right can be looked upon as the means of making a present or future enjoyment possible, but, even if it is so regarded, a right is not the enjoyment"—as a garden, which is an object of the owner's enjoyment, is not the same as the hedge which assures the owner his enjoyment.[18]

§ 141. *Rights and Utilities.* If every right is related to an utility (and no one understood this better than the Roman jurisconsults, whose fundamental ideas on this subject are splendidly illustrated and developed by Vico and Romagnosi) it is evident and undeniable (even Ihering himself did not deny it) that not every utility forms the material of a right. There are indisputably certain interests essential to life which are incapable of juridical protection. Ihering is right in criticising Krause's school for failing to make such a distinction,[19] and acknowledges that some conditions of existence are foreign to law, "ausserrechtliche Lebensbedingungen."[20] Even where legal protection is actually possible, it is by no means true that there are as many rights as there are interests protected. The latter, particularly in the field of public law, are indefinite in number, as can be seen by a glance at the administrative organs of State. "Every protection given to a public utility," writes Jellinek,[21] "necessarily protects an indefinite number of private utilities without constituting rights." Ihering, let us repeat, agrees with this statement. And,

[18] *Thon*, "Rechtsnorm und subjectives Recht," p. 219.

[19] *Ihering*, "Geist des römischen Rechts," 1 Bd. § 71.

[20] Vide *Ihering*, "Der Zweck im Recht," I Bd., p. 452. "Geist des römischen Rechts," § 61.

[21] *Jellinek*, "System," p. 44.

in consideration of it, he must introduce a new element as a correction of his definition of rights. It is necessary for the existence of a true right that "its possessor be entitled to the protection of his interest." This leads us to the second definition of rights ("Selbstschutz des Interesses") to which we have referred.[22] Here real progress is made toward the exact determination of the concept. By the side of the inconsistent idea of interest, put the will of him who can take the initiative ("die Initiative ergreifen") for the protection of the content of his rights. It is well to note that in this amended definition Ihering implicitly renounces his argument that a definition of rights based on interest would be preferable to one referring to will or action. Formerly, in fact, he had stated[23] that the element of will was not enough to define rights, because rights are legally conceded even to those who are legally incapable of acts of will; but interests, that is, the content of utility, exists also in the absence of will and is, therefore, the essential element. And yet, with the correction just given, under the pressure of fact and the logic of nature, he makes a new decision and holds that the characteristic and necessary element of rights lies in the possibility given the agent of "taking the initiative" for their protection by a practical expression or affirmation of will. He even, therefore, feels called upon to show the necessity of representatives in certain cases to act for those who have rights.[24] To what, then, does the proposed inversion or substitution of concept come? Why insert in our thesis that a right lies in interest rather than in the will controlling it, if we must recognize this will on one side under the penalty of not conforming to reality, although

[22] Cf. § 139 and n. 7, ante.

[23] Vide *Ihering*, "Geist des römischen Rechts," p. 321 et seq.

[24] Vide *Ihering*, "Geist des römischen Rechts," p. 339 et seq.

we deny it on the other? The "initiative" of him who has an interest for its protection is identified by Ihering (treating particularly of private rights) with an action at law. There is no doubt that a suit is an effective protection of an interest, and an interest must exist before it can be concretely sustained by suit. But this does not mean that an action is founded directly on the interest itself, and that it serves no immediate purpose of its own. If an action protects the enjoyment of an interest or utility, it is only the secondary effect of the recognition of the juridical will of the agent, by which a definite course of conduct is imposed upon others. This is the proper result of legal processes, in which, therefore, the formal phases of the objective interference in individual conduct are shown. Right makes the content of a utility possible, but it is not constituted by this content. The enjoyment or advantage attainable by the exercise of a power, or in entering a relation, is in respect to the juridical significance of this power or faculty a "consecutivum." Kant saw this clearly and wrote: "In this reciprocal interplay of will, purpose — the material of will — takes no part. Purpose is the motive which prompts the undertaking; it does not affect the relation created by the wills. For example, it is not a question of whether a business contract is profitable, but only as to the form in relation to the interplay of the two wills."[25] If in general a utility corresponds to every right, the reason for this is that act or will is determined only in view of certain ends, but as the object of the will is not the will itself, so the interest is not the right.[26] The former has its

[25] *Kant*, "Met. Anfangsgr. d. Rechtslehre," p. xxxii et seq.

[26] Everyone agrees with *Lasson*, "System der Rechtsphilosophie," p. 454, "In every right there are involved property, possession, power, capacity, title and relationship, which have a use and contain an interest. That which has no use and contains no interest

principle and condition in the latter. In this respect it may be said that right is the social condition of interest, or the possibility of actualizing it in relation to others. This conclusion brings us back to the fundamental view deduced and developed in the earlier chapters.

§ 142. *Conclusion as to the Concept of Law.* What is the result of our study in its last analysis? Have we shown the existence or content of legal maxims? No, for in that case our earlier proposition [27] would not be true, and the juridical principle which we have advanced, whatever it may be, could not have a universally apodictic significance, nor could it be a definition, since another principle conforming to some part

cannot constitute a right." But it does not follow from the fact that a right always involves an interest that a right is an interest. In fact it disproves it. Recently Jellinek's intermediate or conciliatory opinion, which holds that both will and interest enter into the definition of law, has received favor. "Will and interest are necessarily commingled in the concept of right," "System," p. 44. Jellinek first (1892) wrote, "A right is an utility or interest protected by the recognition of man's will-power." The emendation of Ihering's doctrine is noteworthy, and yet insufficient. It is very true, as Jellinek writes, that "man cannot will absolutely, but must will something, as he cannot simply see, hear, feel or think, but must have a content for perception or abstract conception." But let us repeat it, from the fact that will must have an object, it does not follow that will is that object. For example, one must see and hear something (and cannot simply hear or see) and yet it does not follow that sight and hearing are the same as the thing seen or heard. A right is the possibility of willing something in correlation with the will of others, but it is neither the object, which can be willed nor the motive of the will. Jellinek seems to have altered his views, for, in his second edition (1905), the statement first quoted is substituted by one in which the element of interest enters only in the second place. "A right is the will-power of man applied to a utility or interest recognized and protected by a legal system."

[27] See Part I, ante.

of legal phenomenology would be possible. What we have shown is only the form of the idea of law, or that which necessarily appears in every juridical phenomenon or proposition as a designating and requisite factor. The certainty of our conclusion comes from this very limitation of our study, because if a form is determined which represents in a definite way the conceivability of phenomena, it must necessarily correspond to every case in experience without possible exception. The concept which we have advanced and analyzed may be given as follows: Law is the objective co-ordination of possible acts among men, according to an ethical principle which determines them and prevents their interference. Such is the logical scheme of law, such the rational unity which includes the multiplicate variety of juridical criteria. This unity is purely architectonic (to borrow a word from Kant), because it is not produced by elements accidentally presented but formed by a design of reason itself.

# PART III

# THE CONCEPT OF NATURE AND THE PRINCIPLE OF LAW

## CHAPTER I

### PRELIMINARY CONSIDERATIONS

PHILOSOPHICAL NEED OF REFERENCE TO A UNIVERSAL. — PHILOSOPHICAL DOUBT AND POPULAR CERTAINTY. — PROGRESSIVE ORDER OF THE GRADES OF KNOWLEDGE. — RELIANCE ON THE PARTICULAR AS A PRE-PHILOSOPHIC STAGE. — LOGICAL CONDITION OF SCEPTICISM.

§ 143. *Philosophical Need of Reference to a Universal.* Philosophical problems arise when thought, based on the mass of separate data of particular and immediate appearances, begins to refer them to a single principle, which shows their fundamental unity and renders a harmonic and integral vision of the universe. The same conception of the universe or nature is philosophic in this sense, that it supposes and indicates the need born in the human mind of an absolute unification of the multiplicity and variety of phenomena, according to some criterion.[1] Philosophy does not consist, however, in a

[1] What distinguishes the idea of this great whole, called the universe, from that of chaos? Is it the idea of the real existence of the

simple sum or agglomeration of separate data. A man is not a philosopher because he has the greatest knowledge of phenomenal reality, or because he has made discoveries in that field, but because he has subjected sensible data to a new elaboration and considered it from a higher point of view with a new meaning — the universal and absolute meaning — of something perhaps already known in its relativity and particularity. Philosophy is, therefore, a form of knowledge essentially distinct from every other by its specific quality and nature. It is the duty of a philosopher, as Schopenhauer said,[2] not so much

elements which the universe contains? No; for we can conceive of these same real elements existent but unformed and discordant, which can constitute the idea of chaos. In what, then, does the distinction lie? In the idea of the ordered and harmonic disposition of existent things and forces by which a single animated and active whole arises. The idea of this system of things and forces, united to the idea of secret and energic order, with which it animates and preserves, renovates and guides everything, is called nature." *Romagnosi*, "Vedute fondamentali sull' arte logica," Lib. II, § 753; cf. § 754, p. 280 et seq.

[2] "As a general rule it is not the observation of rare and hidden phenomena through experimental research which makes for the discovery of important truths, but the observation of apparent and every-day phenomena. And so the problem is not so much to see what no one has yet seen, as to think that which no one has yet thought of what everyone sees. It belongs, therefore, rather to the philosopher than to the physicist." *Schopenhauer*, "Parerga und Paralipomena," II Bd., p. 111. "It can even be said that the work of philosophy is to study usual and everyday affairs and the universal; on the contrary, the scientific specialist studies rare and strange phenomena and makes their reference to universal or to known data his problem." *Schopenhauer*, "Einleitung in die Philosophie," ed. by Griesebach, p. 28. Cf. on the philosophical problem in general, *Martinetti*, "Introduzione alla metafisica," I, (Turin, 1904), Cap. I; *Dilthey*, "Das Wesen der Philosophie" in "Die Kultur der Gegenwart," Vol. I, VI Abth. (Berlin, 1907), pp. 1–72; *Paulsen*, "Die Zukunftsaufgaben der Philosophie," ibid., pp. 389–422.

to extend his outlook to hidden and rare phenomena as to think unusual thoughts about what is visible to all.

§ 144. *Philosophical Doubt and Popular Certainty.* It is an ancient truth that philosophical problems begin where popular certainty ceases. Where common opinion, based on immediate evidence or undiscussed tradition, stops, there the methodic doubt of the philosopher arises and begins its great and subtle work. This doubt is more acute and pointed where the corresponding popular belief seems clear and obvious.

§ 145. *Grades of Knowledge.* The passage from a lower to a higher form of knowledge is generally shown by this, that what is a datum for the former is a problem for the latter. The interpretation of one fact can be made in different grades. An explanation can be incomplete and insufficient without being false. The resolution of one doubt can give rise to a greater. So, by its nature, shown in the order of its processes, the human mind is somehow impelled to advance in knowledge. The early and rudimental forms of knowledge are "per se" an appeal to, or better still an anticipation or presentiment, obscure but persistent, of other more perfect and adapted forms. They demand and, in fact, import in themselves an ulterior elaboration, which explains them and gives them their full meaning. Thus thought acquires, one by one, relations and criteria better adapted and fitted to a right conception of the world. The lower grades of knowledge are superseded little by little. In such an advance the human spirit celebrates its triumph, which is in fact the triumph of truth.

§ 146. *Reliance on the Particular is Pre-philosophical.* A primary attitude or grade of thought [3] is known by

[3] By speaking of priority and development, we do not mean that one attitude of thought can exist free from all others, because the real unity of the human mind is so constructed that even the highest

this: that separate data of experience are considered individually as independent. The series of external and internal events is presented as broken and divided, since it is formed by a merely fortuitous succession. There is no intrinsic order, nor necessary objective or subjective synthesis. In a word, the reference of data to a common higher principle, by which they can be rectified and given value,[4] is lacking.

principles of which it is capable are found in germ and in some way are shown from the dawn of knowledge. (Cf., on this proposition, the observation of *Lotze*, "Mikrokosmus," III Bd. 4 ed. [Leipsic, 1888], p. 185 et seq.) The ascending order of stages must not be understood in a strictly temporal sense. The separation of the distinct functions and attitudes of the mind is always abstract, representing in sequence what is a complex development in reality.

[4] Such is the characteristic attitude of the primitive mind in regard to natural phenomena. This was perceived and synthesized by *Vico* in "Scienza nuova," Lib. II, "Della Metafisica poetica," 2d ed. by Ferrari, p. 162 et seq.; and his intuitions correspond in substance to what modern studies have shown. (Compare them, for example, with the data collected by Spencer, "The Principles of Sociology," Part I, Cap. VII–XVI, XXIV, etc.) For the nature of early mythological imagination, see, too, *Lotze*, "Mikrokosmus," III Bd., p. 185 et seq. *Ardigò* in "Pietro Pomponazzi" in "Op. Filos.," Vol. I (Mantua, 1882), p. 25, wrote: "At first men thought of phenomena as isolated and as the immediate results of the capricious determinations of mysterious agents of supreme power." Also, "the concept of nature as a universally accepted and rigorously scientific concept is quite modern" (loc. cit.). We must remember, however, that the tendency to a monistic conception of the world is of an early origin, as is clearly proved, for example, by ancient Ionic and Eleatic philosophy. "Greek philosophy," writes *Windelband*, "is born as an answer to the demands of natural sciences and to questions concerning φύσις, that is, concerning the everlasting being in which phenomena take place." "Geschichte und Naturwissenschaft," 3 ed. (Strassburg, 1904), p. 14. For the ancient Greek concept of φύσις, see *Maine*, "Ancient Law," p. 53 et seq. "In its simplest and most ancient sense, nature is precisely the physical universe looked upon as the manifestation of a principle." In general, it can be said that the concept of nature arises

§ 147. *Logical Condition of Scepticism.* This attitude of thought is, therefore, properly pre-philosophical and, we may add, pre-scientific. Only in one case does it acquire a philosophical character, and that is when it is consciously opposed to another attitude looking to a rational comprehension of the world. Its meaning in this case is purely negative, and only as a negative philosophy can be advanced a speculation, which recognizes merely the particular and contests its reducibility and deducibility in respect to the universal. Such is the logical condition of scepticism, which on this point coincides with that of popular realism. But the realist's reliance on the particular differs in being an episode or phase of development, not a deliberate renunciation or refusal to advance like the sceptic's. It is an inferior phase of the cognitive process, far from being definite and fixed, and but a prelude to ulterior phases, betraying a secret aspiration and disposition for them. Scepticism, too, although under the guise of denying the solution of problems, which are the object of philosophy, fulfills effectively (as he who studies it carefully can see) the duty of restating the problems "ab initio," urging a new and closer examination of their terms.

with the beginning of philosophical speculation and is inseparable therefrom.

# CHAPTER II

## PRINCIPLE OF CAUSALITY AND MECHANICAL CONCEPTION OF NATURE

CO-ORDINATION OF PHENOMENA ACCORDING TO A CAUSAL CRITERION.—"A PRIORITY" OF SUCH CRITERION — ITS LIMITS. — COMPLEMENTARY POSTULATES. — IMPOSSIBILITY OF ASCERTAINING VALUES BY IT. — "EVEN THE UNNATURAL IS NATURAL." — IDEA OF FINAL CAUSES AND THE PHYSICAL SCIENCES. — MECHANICAL DETERMINISM AND THE DENIAL OF TELEOLOGY, ESPECIALLY IN THE DOCTRINE OF SPINOZA. — UNIVERSAL VALIDITY OF THE PRINCIPLE OF CAUSALITY.

§ 148. *Co-ordination of Phenomena According to the Causal Criterion.* A true systemization and theoretical elaboration of empirical data result when such data are co-ordinated and reduced under a causal concept. By such elaboration every phenomenon is treated not in its singularity, but in its relation with some precedent phenomenon, which is considered as having necessarily determined it. Thus a chain is formed between all phenomena, in the form of necessity, which connects all phenomena in a continuous and uninterrupted series. So every fact, conditioned in respect to a precedent fact, is at the same time the condition of a subsequent fact. And in this double quality of a cause and effect every phenomenon enters as an element in the scheme of universal reality. The criterion of causality permits and establishes, therefore, a primary synthetic vision of nature as an order made necessary by the sequence of all phenomena. Further reflection shows that if this

criterion is applied in experience and begins to be manifest in experience, it is not, however, a derivative of it, but is an intrinsic necessity of thought and a function of intellect.[1] We actually know "a priori" that every phenomenon (including future phenomena) must have a cause. We know this with absolute certainty, without having proved it by all possible cases, that is, without knowing the causes of all phenomena. We have a principle in this belief which is greater than the evidence of all experience, for experience is particular, and the most it can show is that a definite phenomenon has a definite cause, not that all phenomena must necessarily have causes.[2] Our strictly scientific concept of nature as an ordered unity or mechanical equation of phenomena is founded precisely on the "a priori" certainty, that is, on the universal validity, which we attribute to the causal principle. In this sense Kant was right in affirming that the intellect is the legislator over nature, and that without intellect there would be no nature.[3]

[1] Empiricists who interchange these two positions and believe that all that which is found in experience is derived from it would do well to meditate upon Kant's words in the Introduction to the "Krit. d. rein. Vernunft." The difference between critical idealism and empiricism does not lie in the fact that the latter accepts and the former rejects the aid of experience, but in their diverse concepts of experience.

[2] The causal principle is distinguished from all natural laws by its quality of universal logical postulate, as *Wundt* pointed out in "Ueber den Begriff des Gesetzes" in "Philosophische Studien," Bd. III (1886), pp. 201, 205. The study of separate empirical laws relies on this principle and is governed by it.

[3] "The order and regularity of phenomena, which we call 'nature,' we ourselves bring about, and we should not be able to find 'nature' in these phenomena if we ourselves or the constitution of our minds had not originally put it there." "Thus mind is not merely a faculty which makes rules according to the agreement of phenomena; it is the very legislative power of nature; in other words, without the mind

§ 149. *Causal Criterion is External, Explaining Neither Beginning Nor End.* If the causal principle is legitimate scientifically, and is, furthermore, the presupposition of every scientific consideration and research, the limitation of its value for the interpretation of nature comes from its own qualities. In the first place it is evident that it only applies to phenomena, and, moreover, is only relative and external. A phenomenon can be explained by it only through reference to another phenomenon, which in its turn calls upon a third, and so on indefinitely.[4] The causal criterion allows, therefore, a notion of reality as a series, but does not give its beginning or end. Not the beginning; because weighed in such scales, that is, as a phase in the scheme of successive phenomena, a beginning would have no cause: not the end; because

there would be no nature at all, or rather, no synthetic unity of the multiplicity of phenomena." *Kant*, "Krit. d. rein. Vernunft," 1 Ausg., p. 125 et seq., 134 et seq, ed. by Kehrbach. Cf. "Prolegomena," § 15. Similarly *Fichte* wrote in "Die Bestimmung des Menschen," III Bd., ed. by Kehrbach, p. 96, "Nature, in which I am active, is not a strange entity, without consideration of my existence, into which I can never enter. It is formed by my thought and must be in accord with it."

[4] "According to the conception of mechanical nature, everything exists through another thing, and has its result in a third." So *Fichte* in "Das System der Sittenlehre" (Jena, 1798), p. 144, wrote in opposing "the principle of substantiality" to "the principle of causality." Vide ibid., p. 152. The extrinsic and relative character of the mechanical theory of nature was thoroughly illustrated by *Lotze*, who, in referring to it, wrote in "Mikrokosmus," I Bd., p. 55, (cf. p. 422 et. seq., 448 et seq.): "Things do not exist of themselves but are brought forth in their changing forms by varying circumstances, and this we call their life, without being able to explain by what unity this vortex of events going on side by side is internally fused into a whole. This reproach — of putting together externally as in a mosaic pattern that which seems to have value for us only as proceeding from a single cast — has been constantly brought against the attempts at explanation of physical science."

an ultimate phase would be a cause without an effect.[5] A causal explanation of the world is, therefore, necessarily incomplete. Its radical failure can be seen from this: that the law of causality has no meaning except in respect to modes of being, that is, to modification taking place in reality. It supposes, therefore, an existing reality, which is, so to speak, the substratum or substance which supports or produces the variations. But the law of causality is impotent to give any idea whatsoever of this substance — matter in the first aspect, force or energy in the second — so it is impotent to explain its origin. It can only explain the passage from one state to another, from one mode of being to another, and not the step from non-being to being, or from nothing to something. The law of causality would be, indeed, directly violated and contradicted by "fieri ex nihilo," and thus we are forced in order to apply it, to admit "a priori" that there is external and indestructible substance. In fact the postulate of the indestructibility of matter and energy lies at the base of all the physical sciences, although it is "per se" metaphysical, in other words, without the proper sphere of the science, which treats only of phenomena.[6]

[5] "According to the principle of causality, every change is not only the necessary result of some precedent fact, but is equally necessarily the cause of some subsequent change. The principle of causality does not of itself show the beginning nor end of the series of changes." *Spir*, "Denken und Wirklichkeit," 3 ed. (Stüttgart, 1884), II Bd., p. 139; cf. I Bd., III Bk., Cap. I.

[6] Vide *H. Weber*, "Ueber die Entwicklung unserer mechanischen Naturanschauung im neunzehnten Jahrhundert" (Strassburg, 1900), p. 6, where the scientific importance of this principle is shown and its quality of presupposition noted, "That matter, which cannot begin nor end with an act of creation, is indestructible, is a proposition of axiomatic knowledge of whose truth we are first convinced by neither weight nor measure." To the contrary, *Ostwald*, in "Vorlesungen über Naturphilosophie," 3 ed. (Leipsic, 1905),

§ 150. *Causal Criterion is not Qualitative.* Besides being unsuited to grasp universal reality of itself or in its origin, the causal criterion cannot fully explain phenomena, but leaves a residuum to be considered and digested elsewhere. Causal explanation consists, as we have seen, in the systematic reduction of phenomena to their determining condition, according to some type or mechanical scheme which equalizes every consequent to its antecedents. Specific and qualitative differences remain over, converted into terms of genus and quantity. The new, superior, and complex is understood as participant in the pre-existing, inferior and simple, and as resolvable into the former. A scientific appreciation of the different grades and values of reality is, therefore, impossible by such a test, for, if we recognize a progressive ascendence in the world toward always more perfect forms of existence, we leave at once the realm of pure causality, which interprets the many grades and forms of nature only in what they have that is homogeneous, equivalent, and reciprocal. Thus it is that the causal explanation is shown to be more inadequate as its application is made to the more advanced rather than the lower forms of existence.[7]

esp. Lecture XIV, who tends unduly in general to convert logical necessity and even the causal principle into mere (empirical) habits of thought. He accepts, however, the principle of the conservation of energy and states its law: "There is no transformation without an equivalent change of one or more kinds of energy" (p. 296, cf. 158 et seq.). Another fundamental postulate of the physical sciences admitted as the inversion of the causal law is the law of inertia; that no modification can occur without a cause. Cf., on this point, and on this subject in general, the deep treatise of *Schopenhauer*, "Ueber die vierfache Wurzel des Satzes vom zureichenden Grunde," Cap. IV, § 20. Vide also *Kroman*, "Unsere Naturerkenntnis" (Copenhagen, 1883), esp. § 17.

[7] Vide *Petrone*, "I limiti del determinismo scientifico," where

§ 151. *"Even the Unnatural is Nature."* It is clear that with this physical view of nature everything in it is "normal," any violation or alteration of its laws whatsoever is excluded "a priori," for nature in this sense is nothing more than the form of the necessity of all reality. In the system of cause and effect there is nothing superfluous, no phenomenon is lost, every event has its place.[8] This unfailing collocation or allegiance to the system constitutes the naturalness of all phenomena. So what seems to us in some quality irregular, artificial, depraved, morbid, or somehow exceptional, is in this sense as natural as what we consider regular, genuine, wholesome and sane. "Auch das Unnatürlichste," writes Goethe, "ist Natur."[9] Surely,

this argument is treated with regard to the divers orders of fact and the corresponding hierarchy of the sciences.

[8] "Everything, no matter how minute," writes *Bruno*, "is subject to Providence, infinitely great; every tiny grain is of utmost importance in the cosmic scheme of the universe, because large things are composed of small things, and the small of still smaller, which in their turn consist of grains and particles." "Spaccio de la bestia trionfante," Dial. I, edit. by Gentile, "Op. ital.," Vol. II (Bari, 1907–8), p. 74.

[9] "Even the unnatural is nature." "Whoever does not see it (nature) in everything, nowhere sees it rightly." *Goethe*, "Die Natur," in "Sämmtl. Werke," edit. by Reclam, Bd. XLV, p. 41. We may note, however, that Goethe did not give these words the rigorous scientific meaning that they can have. Cf., for Goethe's concept of nature, *Rickert*, "Die Grenzen der naturwissenschaftlichen Begriffsbildung" (Tübingen, 1902), p. 622 et seq., and *Paulsen*, "Goethe's ethische Anschausengen" in "Gesamm. Vortr. u. Aufsätze," I Bd., 3 ed. (Berlin, 1907), p. 4 et seq. *Bain*, on the contrary, lays stress upon this concept even in his psychological reflections, "The naturalistic mind represents the maximum of disinterested associations. The purpose of the naturalist is not selective, but exhaustive; whatever be the department that he applies himself to, he notices every species belonging to it. . . . He must not have any strong emotional likings of the nature of preference; having to give an account of everything that exists, because it exists, his main delight should be to attain impar-

therefore, any science based on such a conception of nature repudiates all forms of valuation and measures, by which the mind controls reality, dictating norms to it, or governing it by criteria not objective but subjective.

§ 152. *The Idea of Final Causes.* The idea of final causes, which play so large a part in ancient physics, especially in the works of Aristotle, is now considered as a disturbing or at least, a superfluous element. The fact is incontestable that the modern reform of the natural sciences was chiefly due to the progressive abandonment of that idea, where it should have no place, and its significance was, according to Spinoza, that of an "ignorantiæ asylum."[10] The naturalistic philosophers of the Italian renaissance, in their effort to interpret nature "juxta propria principia" (Telesius) attacked the Aristotelian theories, and attempted to correct the concept of finality, or what went by that name.[11] Bacon's criticism was more exact and efficacious in this matter, for he did not attempt to deny absolutely the admissi-

tiality and exhaustive completeness." "Mental and Moral Science," Pt. I, p. 110. *Spencer* writes to the same effect in regard to the social sciences, "In brief, trustworthy interpretations of social arrangements imply an almost passionless consciousness. Though feeling cannot and ought not to be excluded from the mind when otherwise contemplating them, yet it ought to be excluded when contemplating them as natural phenomena to be understood in their causes and effects." "Principles of Sociology," Pt. V, § 435.

[10] *Spinoza*, "Ethica," Pt. I. Vico censured it also, "The physics of the "ignorans" is a popular metaphysics, in which he attributes the causes of things that he does not know to the will of God, without considering the means which such Will uses." "Scienza nuova," (2d ed.), "Degli elementi," Degn. XXXIII; cf. XXXII.

[11] Vide, on this point, *Fiorentino*, "Bernardino Telesio ossia studi storici su l'idea della natura nel risorgimento italiano," Vol. I (Florence, 1872–74), pp. 228, 234–5, 381; Vol. II, p. 50 et seq., et passim. Cf. also *M. Carrière*, "Die philosophische Weltanschauung der Reformationszeit in ihren Beziehungen zur Gegenwart," 2d ed. (Leipsic, 1887).

bility of a teleological conception of the universe, but held that it should not be allowed to prejudice the scientific study of efficient causes. Distinguishing well between physics and metaphysics, he pointed out that the principle of final causes is incongruous and barren in the first, but valid and regular in the second.[12] Another remarkable criticism of this principle was made by Spinoza. It was more severe and radical because based upon a system of metaphysics which excluded every point of view of the natural except one — the rigidly mechanical. According to Spinoza, in fact, the being universal, infinite and eternal, which he called indifferently nature or God,[13] acted through the same absolute necessity by which he existed. In other words, he neither acted nor existed for some end, but for itself. All existing things are, therefore, determined "ex necessitate divinæ naturæ," and are perfect in essence; they can have nothing contingent.[14] The perfection of

[12] See especially, "De Dignitate et Augmentis Scientiarum," Lib. III, Cap. 4; cf. "Novum Organum," Lib. I, § 48, Lib. II, § 2. For Bacon's concept of nature, see *Vera*, "Saggi filosofici" (Naples, 1883), esp. p. 236 et seq.

[13] The distinction between "natura naturans" and "natura naturata" ("Ethica," Pt. I, Prop. XXIX, Schol.), far from showing any dualism, is held by Spinoza to express the immanence of the single and infinite substance (God) in all its modifications. Cf. *Windelband*, "Geschichte der Philosophie," p. 335; *Zeller*, "Geschichte der deutschen Philosophie seit Leibniz," 2 ed. (Munich, 1875), p. 51; *Höffding*, "Storia della Filosofia moderna," Vol. I, p. 298. [Cf., also, *Miraglia*, "Filosofia del diritto," p. xli, Eng. translation, p. 28. — *Tr.*] On the origin of this distinction, which was familiar to Scholastic philosophy from 1250 A.D., see *Siebeck*, "Ueber die Entstehung der Termini natura naturans und natura naturata," in "Archiv für Geschichte der Philosophie," III Bd., (1890), p. 370–78. Cf. *Eucken*, "Geschichte der philosophischen Terminologie" (Leipsic, 1879) p. 122, 172.

[14] It may be observed that Bacon considered the idea of final causes as a regulative or heuristic, and his criticism is reducible, there-

things, however, must be understood, but in regard to the nature and power of the things themselves and not in respect to some subjective criterion.[15] Whoever finds any imperfection or vice in nature, follows a preconceived prejudice and does not base his judgment upon cognition. In other words, he attributes to nature a defect which really exists in his mind.[16] Valuative and teleological judgments, "de bono et malo, merito et peccato, laude et vituperio, ordine et confusione, pulchritudine et deformitate," have to Spinoza's way of thinking, no scientific content. Their significance, he holds to be merely relative and imaginary; they are "præjudicia, modi imaginandi, entia non rationis, sed imaginationis."[17] There is only one way to understand reality truly, and it applies uniformly to every thing, of all grades and of all species. It lies in explaining things according to the universal and immutable laws of nature, based upon an understanding of their intrinsic necessity.[18] Even in reference to human acts, as to

fore, essentially to a proof of the inutility of that idea for the physical sciences. Spinoza, on the other hand, examined the question ontologically (as a constitutive principle), and his condemnation involves not only the utility, but also — and chiefly — the truth of the principle. He categorically affirms "naturam finem nullum sibi præfixum habere, et omnes causas finales nihil nisi humana esse figmenta." "Ethica," Pt. I, App.

[15] "Rerum perfectio ex sola earum natura et potentia est æstimanda, nec ideo res magis aut minus perfectæ sunt propterea quod hominum sensum delectant vel offendunt; quod humanæ naturæ conducunt vel quod eidem repugnant." "Ethica," Pt. I, App. "Per realitatem et perfectionem idem intelligo." "Ethica" P. II, Def. VI.

[16] Vide, on this point, esp., "Ethica." Pt. IV, Præf.

[17] Vide *Spinoza*, "Ethica," Pt. I, App. Cf. Pt. IV, Prop. XXXVII, Schol. II.

[18] "Nihil in natura fit, quod ipsius vitio possit tribui; est namque natura semper eadem et ubique una, eademque eius virtus, et agendi potentia, hoc est, naturæ leges et regulæ secundum quas omnia

which Bacon had declared the principle of final causes particularly applicable,[19] Spinoza wanted a method of the purest objectivity, in order to give them a strictly causal explanation, analogous to that of physical phenomena. Appetites and commotions of the spirit should be contemplated, according to Spinoza, in exactly the same way as the perturbation of the atmosphere, which, although it may trouble us, has definite causes, through knowledge of which we can learn its nature.[20] So a philosopher sees in the affections and passions of man not vices but properties, which he must understand and not judge. "Humanas actiones non ridere, non lugere, neque detestari, sed intelligere."[21]

fiunt et ex unis formis in alias mutantur, sunt ubique et semper eaedem, atque adeo una, eademque etiam debet esse ratio rerum qualiumcumque naturam intelligendi, nempe per leges et regulas naturæ universales." "Ethica," Pt. III, Præf.

[19] Vide *Bacon*, "Novum Organum," Lib. II, § 2.

[20] Vide *Spinoza*, "Tract. Polit.," Cap. I, § IV.

[21] Ibid.; cf. "Ethica," Pt. III, Præf. This is not the place to examine how and on what bases Spinoza formed an ethical system. Schopenhauer states categorically that he "by mere sophistry erected a moral system, whose consequence would never result from the premises," and says that his ethics get their name like "lucus a non lucendo." "Ueber den Willen in der Natur," "Hinweisung auf die Ethik," edit. by Grisebach, p. 337. There is much truth in this opinion, which is held by many. Cf. *Stahl*, "Die Philosophie des Rechts," I Bd., "Geschichte der Rechtsphilosophie," "Spinoza based law and morals on the power of nature. . . . . His law of nature should not be fulfilled by man, but nature itself fulfills it. It is inevitable; man is not free to violate it. He has no claim upon it, he is not subject to duty in the proper sense. All ethical form is lacking in it also, for the law is not ethical but natural" (p. 181). *Cohen*, "Kants Begründung der Ethik," p. 162, "Whoever wants with Spinoza to study human activity and action as if it were a question of lines, areas, and bodies, may put aside everything but ethics"; "Spinoza does not consider ethics in the ordinary sense. He looks upon ethics as an enlightening, natural science, whose object is

§ 153. *Mechanical Determinism.* We have laid stress upon these characteristics of the system of Spinoza because they show in a typical manner the meaning and consequences of a purely mechanical conception of the universe. When an absolute value is given to this conception, such as that given by Spinoza in his metaphysics, not only a repudiation of a final interpretation of nature but a denial of any criterion of appraisement of fact whatsoever follows as a logical necessity. Such conclusions have been reached by other systems with the same fundamental basis. The author of "Système de la nature," to give a typical example,[22] wrote a criti-

to explain the activity of man and trace back his affairs to their source." *Kriegsmann*, "Die Rechts und Staatstheorie des B. von Spinoza" (Wandsbeck, 1878) p. iii. On the contrary, *Jodl*, "Geschichte der Ethik als philosophischer Wissenschaft," 1 Bd., 2 ed. (Stuttgart, 1906), Cap. XIII, § 3, whose arguments, however, cannot have much weight after his own admission, "Spinoza thinks that there is no duty in nature, but merely necessity, a compulsion to be thus and so ("ein Nichtandersseinkönnen") (p. 489–90). But, the question should be broader, as *Höffding* said in "Den nyera Filosofis historie" (Copenhagen, 1874), "It is not of greater inconsequence that he (Spinoza) established a system of ethics than that he established other concepts than that of absolute substance." But it is sufficient for us to note here, at any rate, that in Spinoza's mind ethical terms express only relative not objective or universal truth. Nature does not know ethical values. "Bonum et malum quod attinet, nihil etiam positivum in rebus, in se scilicet consideratis, indicant, nec aliud sunt, praeter cogitandi modos, seu notiones, quas formamus ex eo, quod res ad invicem comparamus." *Spinoza*, "Ethica," Pt. IV, Præf. "In statu naturali nihil fit, quod justum, aut injustum possit dici . . . . Ex quibus apparet, justum et injustum, peccatum et meritum notiones esse extrinsecas; non autem attributa, quæ mentis naturam explicent" (Ib., Pt. IV, Prop. XXXVII, Schol. II. Cf. "Tract. Theol. Polit." Cap. XVI; "Tract. Polit.," Cap. II).

[22] On this work of the Baron *Holbach* (published in 1770 under the name of Mirabaud), see *Lange*, "Geschichte des Materialismus und Kritik seiner Bedeutung in der Gegenwart," 7 ed. (Leipsic, 1902), I Bd., p. 359 et seq.; *Jodl*, "Geschichte der Ethik," I Bd.,

cism of natural teleology, entirely analogous to that which Spinoza with a larger philosophical spirit wrote a century earlier. But Holbach's notion of order, like Spinoza's,[23] is entirely subjective; the distinction between the ordered and disordered has no place in nature, because in it, properly considered, all is of one make.[24]

§ 154. *True Validity of the Causal Principle.* This brief historical review — to which it would be easy but superfluous to add more — offers to him who really considers the intrinsic coherence of a causal principle a proof of what we said above: that any valuation of existing things is logically impossible under a strictly causal or mechanical conception of nature.[25] In saying this we are far from contesting the legitimacy of such conception but we have shown explicitly that the explanation "per causas" is a necessary form of knowledge which has an "a priori" value in respect to all phenomena. In fact, it not only has weight in matters which are strictly objects of physics, but can also be validly extended to those which, as objects of other studies, are usually

p. 469 et seq.; cf. *Fragapane*, "Obbietto e limiti della Filosofia del diritto," Vol. I, p. 51 et seq.

[23] ". . . quasi ordo aliquid in natura præter respectum ad nostram imaginationem esset." *Spinoza*, "Ethica," Pt. I, App.

[24] "The order and disorder of nature do not exist, we find order in what conforms to our being, disorder in what is opposed to it. All, however, is in order in nature, of which all parts must follow certain and necessary rules, which come from its essence; there is no disorder in a whole where all the results are the effect of natural causes, which act as they must infallibly act." "In relation to the great whole, all the movements of beings, all their modes of action can only be in order and always conform to nature." "Système de la nature," Pt. I, Cap. V (p. 52 and 55 of edit. 1781).

[25] Cf., on this point, *Petrone*, "I limiti del determinismo scientifico," p. 115 et seq.; *Bauch*, "Ethik" in "Festschrift f. K. Fischer, Die Philosophie im Beginn des XX Jahrhunderts" (Heidelberg, 1904–5), I Bd., p. 88 et seq.

considered with other criteria and under other aspects: — human and social facts are not excluded. It can be generally asserted that at every application of the causal principle to matter not before examined by its light, that is, when anything is considered natural and determined which before had been treated as arbitrary and accidental, human science takes a step forward. We can observe that the methodological significance of the doctrines both of Darwin and Malthus, as well as of their followers, lies in the attempt to introduce the criterion of natural causality into matters in which that of final causes alone had previously prevailed.[26] In our mind, at any rate, there can be no question but that the causal explanation (whether it has as yet obtained or not) is possible in every phase of phenomenal reality. And we are inclined to agree with Spinoza that even human acts — inasmuch as they form a part of such reality — can be treated with the same rigorous objectivity which is proper in physics and geometry, "perinde ac si quaestio de lineis, planis aut de corporibus esset,"[27] and we even affirm with Kant that such actions themselves as natural phenomena are necessarily determined and could be foretold as accurately as eclipses of the sun and moon, were it possible to have full knowledge of their antecedents.[28] But in this connection especially, we must always bear in mind this capital truth, that although the causal conception

[26] In the physical sciences the hypothesis of Kant and Laplace on the formation of the solar system has this fundamental significance.

[27] *Spinoza*, "Ethica," Pt. III, Præf.

[28] See *Kant*, "Kritik der praktischen Vernunft," 1 Th., 1 Buch, III Hauptst., p. 120 of the edit. by Kehrbach. Cf. "Krit. d. rein. Vernunft," Transscend. Elementarlehre, II Th., II Abth., II Buch, II Hauptst., 9 Abschn., esp. p. 439 et seq. Vide also in an analagous sense, *Fichte*, "Die Bestimmung des Menschen," 1 Buch., esp. p. 19, *Schopenhauer*, "Ueber die Freiheit des menschlichen Willens," passim.

is legitimate and necessary for a sure understanding of phenomena, still it is not the only conception actually and logically possible, as we will show in the following chapter.

# CHAPTER III

## APPRECIATION OF THE END AND METAPHYSICAL CONCEPTION OF NATURE

TELEOLOGICAL INTERPRETATION AS THE COMPLEMENT OF THE CAUSAL INTERPRETATION. — NEED OF DISTINCTION: THE FAULT OF THE ARISTOTELIAN THEORY. — INTRINSIC FINALITY OF NATURE AND THE MEASURE OF THE NATURALNESS OF NATURE. — "NEXUS EFFECTIVUS" AND "NEXUS FINALIS": VALUE OF THE TWO CRITERIA AND THEIR LEGITIMATE CO-EXISTENCE. — ORGANISM AND ENTELECHIA. — OBSERVATIONS ON A KANTIAN DOCTRINE. — CONSEQUENCE OF THE APPRECIATION OF THE END. — NEW IDEA OF THE NATURAL. — NATURE AND SPIRIT.

§ 155. *Teleological Interpretation of Nature as the Complement of the Causal.* Besides the mechanical or strictly physical concept of nature, there is another we can call metaphysical, not less valid nor less necessary than the first, founded, like the first, on an intrinsic function and attitude of our mind. Reality seems, from one point of view, subject to a chain of causal determinations which bind all phenomena together, but is also animated by a spontaneous and inexhaustible power which directs and guides the processes and raises it by degrees through successive development to new forms and higher goals.[1]

[1] Such is, in substance, the concept of nature which Comte qualifies as proper to the "metaphysical state." "The last term of the metaphysical system consists in conceiving of a single, great, general nature, considered as the only source of all phenomena, in place of different particular entities." *Comte*, "Cours de philoso-

Nature in this sense is not the mechanical unity of phenomena, the law of the reducibility of consequents to antecedents, a blind and rigid formula, called by Hegel "the corpse of the intellect," [2] but is the living principle which moves this mass of the universe and is expressed in the infinite variety of its development. It is the substance which we have seen to be free from the bounds of causality. It is internal reason which gives norms to all things and assigns them their tendencies, functions, and ends. Such a concept of nature, rightly considered, does not contradict but integrates and completes the causal concept, for from the contrast of their sequelæ come the final relations and values. And if quantitatively a constant equality is preserved between the "prius" and "posterius," still there is a qualitative increase in every natural development which breaks this equality, the second term being greater than the first, and related to it as end to means. The teleological interpretation of the universe is, however, both legitimate and unavoidable, and recourse to it is the more necessary as the relations under examination grow higher and more complex.[3]

§ 156. *Need of Distinction between the Teleological and Causal Concepts.* The two concepts, the physical or mechanical, and the metaphysical or teleological, can and should co-exist as forms of interpreting nature, but must be kept distinct. Each is valid in its own sphere, that is, inasmuch as it gives a view of reality. Thus

phie positive," Vol. I, p. 5. In comdemning this concept, Comte did not see that he was contradicting a fundamental necessity of thought, which it would not be possible to discard even after the advent of the hypothetic "positive state."

[2] Estranged from the idea, nature is the corpse of reason," *Hegel*, "Vorlesungen über die Naturphilosophie" (Berlin, 1842), § 247, p. 24.

[3] Cf. § 150, and n. 17, ante.

the teleological criterion institutes a measure which would never be recognized by the mechanical criterion, but which cannot on that score be said to be erroneous, as the other in its turn is not erroneous. It is irrefutable as long as it remains within its own confines and is accompanied by a knowledge of its relativity. The error lies in the confusion or exchange of the terms of the two interpretations of nature or in the assignment of exclusive value to one of them, as used to happen frequently and happens too often even now.[4]

§ 157. *Fault of Aristotle's Concept of Reality.* The Aristotelian doctrine, to which reference is proper on this subject, is at fault not for accepting the principle of final causes in the interpretation of nature, but for not tempering and harmonizing this teleological concept with the mechanical in a critical way. It is easy to see how his idea of final causes prejudices and hinders the purely physical explanation of phenomena at every turn. Aristotle did not conceive of nature as subject to immutable and inviolable natural laws but as a perpetual and laborious struggle between two principles, each trying to subject the other. Form, as final cause, tries to imprint its essence upon matter, and is not always successful in this, but the result differs, depending upon the degree of resistance in matter. With such a

[4] From this fundamental equivocation, in the varied and ambiguous use of the terms nature and natural, infinite philosophical and juridical difficulties and disputes arose. Cf. in general, *J. Dewey*, "Nature," in "Dictionary of Philosophy and Psychology," edit. by J. M. Baldwin, Vol. II (New York, 1902); *Eisler*, "Natur," "Wörterbuch der philosophischen Begriffe," 2d ed. (Berlin, 1904); *G. C. Lewis*, "Remarks on the Use and Abuse of Some Political Terms," new edit. (Oxford, 1877), § XIV, "Nature, Natural, Unnatural, State of Nature"; *D. G. Ritchie*, "Natural Rights," 2d ed. (London, 1903), Pt. I, Cap. II, "On the History of the Idea of Nature in Law and Politics," and IV, "De Divisione Naturæ."

teleological concept we can understand how not all that which exists is natural in Aristotle's mind, but only what corresponds to the intent of nature or adequately conforms to its end.[5] Reality is not a homogeneous whole, but is essentially a scale of perfections. Phenomena are distinguishable as regular and irregular (Τέρατα). Some existing things, for example, monsters and the deformed, are nature's failures. In general, whatever has a less complex and proportioned life, or is more brute and amorphous than organic or is less perfect organically, shows a partial impotence or incompleteness of nature in the actualization of her designs.[6] Aristotelian physics assumes, therefore, qualities more valuative than explicative. It considers the tendencies more than the laws of reality. It is in every case more a philosophy than a natural science, as Hegel observed.[7] The rigor of method and criticism which marks modern science is sought in it in vain, while it is almost typical of other Greek philosophers, for example, of Democritus.

[5] "Ἡ δὲ φύσις τέλος ἐστίν. Οἷον γὰρ ἕκαστον ἐστι τῆς γενέσεως τελεσθείσης, ταύτην φαμὲν τὴν φύσιν εἶναι ἑκάστου, ὥσπερ ἀνθρώπου, ἵππου, οἰκίας," *Aristotle*, "Polit.," Lib. I, Cap. I (II), § 8.

[6] See the characteristic steps, illustrated by *Zeller*, "Die Philosophie der Griechen," Zw. Th., Zw. Abth., pp. 422–31; vide also, p. 330 et seq., p. 488 et seq., 803. Cf. *Burle*, "Essai historique sur le développement de la notion de droit naturel dans l'antiquité grecque" (Trévoux, 1908), pp. 367–69.

[7] Vide, *Hegel*, "Vorlesungen über die Geschichte der Philosophie," Zw. Th., p. 301 et seq. The observation of Vico in "De Antiquissima Italorum Sapientia," may be recalled: "Non vidit haec Aristoteles, quia Metaphysicam recta in Physicam intulit; quare de rebus phisicis metaphisico genere disserit per virtutes et facultates," etc. (Cap. IV, p. 84, edit. by Ferrari, "Opere," Vol. II), and in his first "Risposta" to the "Giornale de' letterati d'Italia," "Aristotle has sinned as much in treating physics metaphysically as power and faculties, as Descartes has in treating metaphysics physically in finite acts and forms." (§ III, p. 124, l. cit.; cf., also, the second "Risposta," § IV, p. 156.)

In this respect, therefore, it is no wonder that Bacon, attempting the methodical restoration of science, preferred the physical theories of Democritus to those of Aristotle and Plato[8] and that the modern speculative renaissance, in general, was hostile to Aristotle, as we have said. Opposition to Aristotelian teleology had, furthermore, all the characteristics of a reaction. Not only was the mechanical concept of nature accepted and turned to profit (the spiritualistic Descartes was among its most unbinding champions), but this concept itself was generally given value not so much as an integration, but as a negation of the teleological concept. Only at a later date, under Leibniz and above all under Kant, do we find the beginning of a rational reconciliation of the two criteria. While, however, we admit at once that Aristotle did not have an adequate understanding of the importance of the causal explanation and that in his doctrine of final causes he erred in manifest anthropomorphism,[9] yet we must not fail to recognize the legitimacy and importance of the fundamental criterion he adopted for the conception of nature. We do not hesitate to say that the teleological criterion becomes more necessary, while the causal criterion is more strictly understood and applied. As one progresses in the anatomy of reality with the analytical process proper to causality, and as

[8] Vide *Bacon*, "De Dignitate et Augmentis Scientiarum," Lib. III, Cap. IV, end. For the methodological value of ancient atomists, see *Lotze*, "Mikrokosmus," III Bd., p. 223 et seq. For the difference between ancient and modern atomists, cf. *Zeller*, "Ueber teleologische und mechanische Naturerklärung in ihrer Anwendung auf das Weltganze" in "Vorträge und Abhandlungen," Zw. Samml. (Leipsic, 1877), p. 536.

[9] On this proposition, see the severe criticisms of *Lange*, "Geschichte des Materialismus," I Bd., p. 61 et seq., and cf. *Eucken*, "Die Methode der Aristotelischen Forschung" (Berlin, 1872), p. 91 et seq., 151 et seq. Cf. *Zeller*, "Die Philosophie des Griechen," Zw Th., Zw. Abth., pp. 422–31.

one shows the reducibility and mechanical equivalence of phenomena through the principle of the indestructibility of matter and energy, the clearer becomes the relativity of such interpretation and its unfitness to grasp the true advance of the world in its essence. In fact, the causal explanation supposes that a tendency and direction has previously been given to reality; supposes a power or active principle in it, whose successive extrinsifications it collects and co-ordinates in its own way.[10] This is how the rigorous and quasi-schematic idea of causality demands by way of complement the idea of an active substance which gives its own sense to causal successions, and moves through these to qualitative distinctions and more complex forms and types, which can logically be supposed to be already implied in the primordial intent of nature, in other words, be looked upon as ends in respect to the anterior and simple phases of development.

§ 158. *Intrinsic Finality of Nature.* To admit an intrinsic or immanent finality in nature is nothing more than to consider it in the absoluteness or spontaneity of its principle.[11] While the causal criterion indicates, as we have seen, a purely relative necessity between the divers phenomena or phases of growth, it does not embrace reality as a whole nor explain the universe, in relation to which no causality or necessity can be found. The principle of reality, the very existence of the world, is "per se" contingent. Its rationality can be understood

[10] Cf. *Lotze*, "Mikrokosmus," esp. Bk. III, Cap. V. "Every example of causality forces us to conceive of the possibility of an exchange of influences, to put in the place of simple natural collectivity a single eternal substance in which the separated multitude of phenomena would not appear distinct." (I Bd., p. 429).

[11] "The true teleological conception lies in this," writes *Hegel* in "Vorlesung über die Naturphilosophie," p. 11, "to conceive of nature as free in her proper sphere of life."

from the point of view of finality, rather than under the causal aspect. In other words, the direction shown by reality in its development or its tendency to take on certain forms of life can be considered. The angle of vision, however, is here inverted, that is, what is last in phenomenal production can be looked upon as the reason for what is primal. The basis of intelligibility is no longer in the coefficient but in the product, not in the amorphous and simple but in the organic and complex. The higher grades of development throw light on the lower and give them a new and deeper meaning, showing them to be medial in the system of the ends of nature. The teleological interpretation is thus placed above the causal or mechanical without destroying or weakening it in any way; the "nexus effectivus" subsists near and besides the "nexus finalis," forming its empirical complement or sensible aspect.[12] Finality is shown over the system of causes, and is, in a certain sense, this same causality seen from within. It is "causality become transparent," as E. Hartmann says.[13] Teleology and mechanism are, in a

[12] "The peculiarities of nature lie in this, that it acts in a mechanical way, and notwithstanding that it is a blind piece of machinery, accomplishes its purpose." *Schelling*, "System des transscendentalen Idealismus," in "Sämtliche Werke," I Abth., III Bd. (Stüttgart, 1858), p. 608.

[13] *Hartmann*, "Kategorienlehre" (Leipsic, 1896), p. 475. Vide, also, *De Sarlo*, "Metafisica, scienza e moralità" (Rome, 1898), p. 24 et seq.; *Petrone*, "I limiti del determinismo scientifico," "Il problema della morale" in "Problemi del mondo morale meditati da un idealista" (Milan, 1905), p. 260 et seq. Cf. on the reconciliation of these two considerations, *Sigwart*, "Der Kampf gegen der Zweck" in "Kleine Schriften," 2 Ausg. (Freiburg, 1889), II Bd., esp. p. 43 et seq., "Logik," 3 ed. (Tübingen, 1904), II Bd., p. 249 et seq., 770 et seq.; *Wundt*, "Logik," I Bd., p. 631 et seq., esp. p. 645, 651. Also, note the profound essays by *Trendelenburg*, "Logische Untersuchungen," 3 ed. (Leipsic, 1870), esp. II Bd., Cap. IX, and by *Lotze*, "Mikrokosmus," esp. Lib. IV, Cap. I.

word, two different ways of collocating the same data, which meet in the absolute, according to Leibniz,[14] or, at least, possibly may meet, as Kant says.[15] It is not true that the teleological interpretation is subjective and the causal objective, for the causal interpretation is not less subjective than the other, since it answers a logical need, an "a priori" form or function of the intellect.[16] On the other hand, there is no trace here of anthropomorphism in the popular sense, that is, of an improper assimilation of external facts to those of man, for it is evident that in speaking of the ends of nature no conscious deliberation, founded on representation of the outcome such as takes place in the human psyche,[17] is meant; and

[14] Vide *Leibniz*, "Specimen Dynamicum pro Admirandis Naturæ Legibus," etc., in "Leibnizens mathematische Schriften," ed. by Gerhardt, VI Bd. (Halle, 1860), Pt. I, p. 242 et seq. Cf. *Zeller*, "Ueber teleologische und mechanische Naturerklärung," p. 540 et seq. We should, however, note that Leibniz (differing from Kant) did not have a rigorous conception of causality, as can be seen in his doctrine of miracles. Cf., on this point, *Zeller*, "Geschichte der deutschen Philosophie seit Leibniz," p. 155 et seq.

[15] Kant, without making any dogmatic statement, gave glimpses of the possibility of a transcendental coincidence of the two criteria. "Kritik der Urtheilskraft," II Th., §§ 77, 78 and passim, for ex. § 70. "Wherefore it is undecided whether in the unknown inner soul of nature, the physico-mechanical and the teological reasons may not depend upon one principle."

[16] "To seek the purpose is as natural for the spirit as to seek the cause, . . ." *Lasson*, "Kausalität" (Berlin, 1904), p. 157.

[17] Against the possibility of such an error, see *Kant*, "Krit. d. Urtheilskr.," § 68. Cf. *Spir*, "Denken und Wirklichkeit," II Bd., pp. 152–87; "Vom dem Endzweck der Natur" in "Philosophische Essays," esp. p. 93 et seq. The equivocations on this subject are much too frequent, as *E. Hartmann* points out, "Kategorienlehre," p. 437, "The confusion of the unessential idea of a conscious aim with the term 'conformity to purpose' or 'finality' still exists in th usage of language and keeps an aversion to teleology awakened inethe circles of those half educated people who are utterly uncon-

there is no exchange of the objective finality, inherent in the products of nature with the accidental and extrinsic utility which they can have for man.[18] But it is a proper criterion to show and weigh adequately the most profound and intimate associations in the order of fact and the development of its manifestations.

§ 159. *Organism and Entelechia.* In a word, we have in the intuition of ends "a further principle" for the knowledge of nature;[19] and we must remember this principle, above all, when we study the characteristics of organic entities. For an organism is pre-eminently a system in which the various parts are not determined "per se," or joined in a relation of simple coexistence, accidental in respect to the whole, but are so placed as to co-operate with their respective functions to maintain the life of the whole. They are not, therefore, only causes, but also in a stricter sense means or instruments formed naturally in relation to a definite end.[20]

scious of the fact that the German speculative philosophy has long since stripped this unessential idea from the conception."

[18] Cf. *Kant*, "Krit. d. Urtheilskr.," § 63. The difference between intrinsic and extrinsic finality was clearly indicated also by *Hegel*, "Vorlesung über die Naturphilosophie," § 245, Zusatz, p. 10 et seq.

[19] Cf. *Kant*, "Krit. d. Urtheilskr.," § 61.

[20] "From the purpose of the whole the fixed relations of work and accomplishment are established; the relation of the part to the whole is seen if its contribution is known, which it adds to the preservation or continuity of all other parts. Physiology has never been able to deprive itself of this point of view; and it was a superfluous polemic when, in the interests of a purely causal-mechanical contemplation of living things, all and every employment of the conception of purpose was combated." *Sigwart*, "Logik," II Bd., p. 255. Cf. also, *Wundt*, "Logik," II Bd., I Abth., p. 537 et seq. *Rickert* in "Die Grenzen der naturwissenschaftlichen Begriffsbildung," p. 456, writes: "This science (biology) may in general be defined so as to treat of bodies whose parts act in teleo-

necessity imply the concept of final causes since we must weigh them on such scales, and that when we have once established such a principle we are prone to conceive of all nature as a system governed by the rule of final causes.[23] But we must say that Kant has too markedly separated the organic from the inorganic, granting a predominance to teleological interpretation as for phenomena of the first class, and not permitting it in the second except by way of analogy, and in an almost fictitious or hypothethical method. But, in conformity with the teaching of the modern science of nature, we must consider the divers orders of nature as ascending manifestations of one principle in intimate and uninterrupted relations "inter se." Thus, in the so-called inorganic world, we find an energy which becomes specific in various forms, and is resolved in relations of reaction and combinations in a determinate sense. So in it, too, we find a series of growing complications. In a word, we recognize in it an evolution, and evolution means a tendency towards some goal, a subordination to a purpose.[24] Of course the teleological

[23] Vide *Kant*, "Krit. d. Urtheilskr.," §§ 67, 75.

[24] "Whatever develops must develop into its inherent destiny and show a quality of self-determination or liberty." *K. Fischer*, "Kritik der Kantischen Philosophie" in "Philosophischen Schriften," II, 2 ed. (Heidelberg, 1892), p. 212. "The conception of development presupposes a difference of lower and higher, *i.e.*, objectively real differences of value, which in turn are to be measured by the purpose." *E. Hartmann*, "Kategorienlehre," p. 468. "This law is teleological in nature, for it looks upon the differentiating of simple forms as a process which has for its purpose the generating of the complex form. Even where this is not expressly stated the thought of purpose is nevertheless visible, for the differentiating process is examined not in relation to its causal conditions, but in reference to its result." *Wundt*, "Logik," II Bd., 1 Abth., p. 540. Cf. *Lasson*, "Kausalität," p. 176. Vide, also, the recent observations of *Aliotta*, "Cangiamento ed evoluzione" in "Cultura filosofica," II, 1908, p. 49 et seq.

quality is presented much more fully developed in organisms, and is even more predominant in the psychic system, where the end is anticipated in knowledge and becomes the motive of action; but, nevertheless, we must admit the existence of elementary conditions and precursors of finality (perhaps undeveloped and latent) even in the lower forms of existence, under pain of ignoring the fundamental unity of nature.[25] On the other hand, the causal principle controls organisms as well as the lower forms.[26] Kant's statement, therefore, that mechanical explanation of organisms independent of the teleological[27] will never be possible, does not seem justified under a rigid examination.

[25] Cf., on this subject, the arguments of *K. Fischer*, "Kritik der Kantischen Philosophie," p. 213, which, however, in their reference to Kantian philosophy "as à theory of development," have the value of integration rather than of true interpretation.

[26] In this sense, for example, *Rickert* writes in "Die Grenzen der naturwissenschaftlichen Begriffsbildung," p. 457: "However many reasons may be advanced that the conception of mechanical causality is not sufficient as the explanation of organism, natural science can never give up the endeavor for a mechanical comprehension of the entire physical world, and therefore, it must leave a place in organic life to be mechanically explained." *Lotze* put effective emphasis on this point, upholding the necessity of the mechanical conception (even for organisms) at the same time showing its insufficiency. "Nowhere is mechanism the nature of things; but nowhere does nature manifest itself in any form of empirical existence except by it." "Mikrokosmus," 1 Bd., p. 451.

[27] "It is certain beyond a doubt that we cannot study sufficiently organized beings and their inner possibilities according to the mere mechanical principles of nature, much less can we explain it; and this is so certain that one can boldly state it is impossible for man even to imagine such a design or to hope that perhaps a Newton will arise again who can make comprehensible the generation of a blade of grass according to natural laws which no purpose has arranged; no such intelligence is possessed by man." *Kant*, "Kritik. d. Urtheilskr.," § 75. According to *E. Haeckel*, "Die

§ 161. *Co-existence of Final and Causal Principles.* The truth is that the final and causal principles can co-exist perfectly, even as heuristic principles, so that when we consider an organic being, we can and must examine equally what is the cause and what the end of its parts. Both kinds of examination are legitimate, both aid the integrity of knowledge, neither is superfluous, — knowledge of the end of a given organ alone will not dispense with a study of the physical laws and processes of its formation; conversely, it is not enough to know the structure of some part of an organism, but one must be able to show its end or function in relation to the whole. Where this last knowledge is not attained, the naturalist sees in such a structure an unsolved problem, of whose ultimate solution, however, he cannot doubt. The maxim "nature does nothing in vain"[28] is applicable here as a guide in the research, and as complementary to the other that nature leaves nothing to chance.[29] In the study of organisms the need of a teleological measure is felt, indeed, no less strongly than that of a causal explanation.[30]

§ 162. *Value of Final and Causal Criteria.* The diverse value of the two criteria appears, however, when we consider the consequences which we can deduce from

Welträthsel" (Bonn, 1899), Cap. XIV, this new "Newton of organic nature" is not only possible, but has been incarnated in Darwin. This is certainly not true, for Darwinism is not the negation of teleology. Cf., on this point, *Morselli's* note in "I problemi dell' universo," the Ital. ed. of the above work (Turin, 1904), p. 373 et seq.

[28] "Οὐδὲν μάτην ἡ φύσις ποιεῖ," *Aristotle*, "Polit.," Lib. I, Cap. I (II) § 10.

[29] *Kant*, "Krit. d. Urtheilskr.," § 66.

[30] Cf. *Reinke*, "Der Neovitalismus und die Finalität in der Biologie" in "Rapports et comptes rendus du II Congrès international de Philosophie" (Geneva, 1905), p. 163 et passim; vide, also, the report of the discussion.

them. According to the criterion of the end, we can establish a distinction (undeterminable by any causal test) between the normal and abnormal, the physiological and pathological. The cause of a disturbance in the functions of an organism is judged less natural or unnatural, althouth it is explicable causally, and enters in this way into the mechanical or physical concept of nature.[31] In such an antinomy the double significance of this term, the object of our prior criticism, can be seen.

[31] Significant, although not founded on a truly philosophical analysis, is the objection which *Voltaire* made to the thesis of mechanical naturalism, upheld in "Système de la nature" (Cf. § 153, ante.): "How can you endorse it? In physics, a child who is born blind, or without the use of its legs, a monster is not contrary to the nature of the species! Can you so contend for a moment? Is it not the ordinary regularity of nature that constitutes order, and irregularity that makes disorder? Is it not a very great disorder and a sad irregularity that a child to whom nature has given hunger and thirst has an obstruction in his esophagus? This disorder has doubtless its causes. There can be no effect without a cause, but this is a very unorderly effect." "Dictionnaire philosophique," "Dieu, dieux," Sect. IV, of edit. of "Œuvres Complètes" (Basle, 1786), Vol. XXXIX, p. 308. Cf., for this, *Lange*, "Geschichte des Materialismus," 1 Bd., p. 369 et seq. *Durkheim* wrote in "Les règles de la methode sociologique," p. 72; "Sickness is no more miraculous than health; it is founded equally on the nature of beings. Only it is not founded on the normal nature." We must notice that the concept of normal nature, in its supposition of a knowledge of an end, cannot be obtained by simple empirical observation. Cf. *Ulrici*, "Gott und die Natur," 3 ed. (Leipsic, 1875), p. 595 et seq.; *Bauch*, "Ethik," p. 88 et seq.; *Bayet*, "Sur la distinction du normal et du pathologique en Sociologie," in "Revue philosophique," January, 1907, p. 67 et seq. That sickness *should be cured* is valuative and exceeds the simple analytical knowledge of the process of sickness as a natural fact. *Merkel* is not right, therefore, in invoking the analogy of medicine (which really is in need of an ethical foundation, however elementary) to hold that philosophy of law can gain knowledge of a norm from a simple observation of the facts themselves in order to weigh it and eventually correct it. "Ueber das Verhältnis der Rechtsphilosophie

The internal finality, entelechia, is shown in the organism by the correspondence between the organs and functions and by a continuous and co-ordinated force of reintegration and adaptation, which tends to preserve the correspondence in all varieties of conditions. An organism is not only an organized being, it is a being which organizes itself.[21] Its formation and reproduction are spontaneous in such a way as to oblige us to recognize an animating principle in the material, that is, to look upon it as subject to a suprasensible determination (according to ends), not contrary but superior to the causal. And, whenever we admit (for there is no reason for an "a priori" denial) that organic species are transformed by a series of successive modifications or even arise from the inorganic, it is more necessary to suppose that there exists in them or in matter in general a spontaneous tendency to life, an intrinsic capacity of co-ordination and adaptation, which is equivalent to saying an immanent finality.[22]

§ 160. *Kantian Doctrine of the Organic and Inorganic.* Kant has shown that only true and proper organisms of

logical unity. In fact the conception of unity is so inseparable from the conception of organism, that on account of their teleological connection only we call the living things organisms." A science of organisms without any teleological moment would be a contradiction "in adjecto."

[21] Vide *Kant*, "Krit. d. Urtheilskr.," esp. § 65. Cf. *Schelling*, "Ideen zu einer Philosophie der Natur" in "Sämtliche Werke" 1 Abth., II Bd. (Stüttgart, 1857), p. 40 et seq.

[22] "Very far from authorizing the denial of vital spontaneity and immanent finality, one can go so far as to say that the empirical laws, which govern the transformation of organisms, carry such spontaneity and finality as postulates of the transformism." *G. Richard*, "L'idée d'évolution dans la nature et l'histoire" (Paris, 1903), p. 131. Cf. *Boutroux*, "De l'idée de loi naturelle dans la science et la philosophie contemporaines," (Paris, 1895), esp. pp. 94–101.

Teleologically considered, nature is not a principle of identity but of hierarchy. It is not neutral in respect to the course of growth. It is not shown indifferently in all phenomena, but emerges from them, inasmuch as it tends to definite types and co-ordinations. The nature of anything is in this sense the type or sign of perfection, or what every individual or particular example has to be in order to correspond to the final purpose proper to its species.[32] To live according to nature (ὁμολογουμένως τῇ φύσει ζῆν), in the maxim of the Stoics,[33] means, therefore, in general, to attain one's end, that is, to obey the law which springs for each being from

zur 'positiven' Rechtswissenschaft," in "Gesamm. Abhandl.," II Teil, 1 Hälfte, p. 319 et seq.

[32] See, for the frequent application of this concept, even in relation to law, *M. Voigt*, "Das jus naturale æquum et bonum und jus gentium der Römer" (Leipsic, 1856–76), 1 Bd., p. 270 et seq., and esp. Beil. III, "Ueber die Begriffe von *natura* und *naturalis* in den juristischen Quellen," p. 547 et seq.; where the two fundamental meanings (the physical and the normative) which the word "natura" had in the mind of Roman jurists are illustrated in detail, with various subdivisions. "The question whether 'naturalis' simply designates conformity to physical nature or to the nature of the thing is to be answered according to the possible contrast in which the 'naturale' is thought or placed." Cf., for the various meanings and applications of the word "natura" in Roman law, *Lasson*, "System der Rechtsphilosophie," p. 73 et seq.; *Bonfante*, "Obbligazione naturale" in "Foro italiano," Vol. XVIII, 1893, p. 150 et seq.; *Gradenwitz*, "Natur und Sklave bei der naturalis obligatio" (Königsberg, 1900), § 2, esp. p. 15 et seq.; *Bryce*, "The Law of Nature," in "Studies in History and Jurisprudence" (Oxford, 1901), Vol. II, p. 148 et seq.; *A. J. Carlyle*, "A History of Mediæval Political Theory in the West," (Edinburgh, 1903,) Vol. I, Pt. II, "The Political Theory of the Roman Lawyers," p. 33 et seq.

[33] Vide, on this and other analogous formulæ, *Ueberweg-Heinze*, "Grundriss der Geschichte der Philosophie des Alterthums," 9 ed. (Berlin, 1903), p. 300 et seq. Cf. *Jodl*, "Geschichte der Ethik," 1 Bd., p. 82 et seq.; *Ritchie*, "Natural Rights," p. 34; *Burle*, "Essai historique," p. 413 et seq.

its proper internal constitution, notwithstanding that the external manifestations can also partially deviate from it.[34] So objective reality, interpreted from an higher point of view, lends itself to a comparative appreciation, that is, takes its place in a scheme of values, and we acquire a deeper knowledge of it than we could obtain by studying the series of changes from a merely causal point of view. By nature we mean, now, the principle that develops in the world through an ascending order of types, the reason which vivifies matter, and compels it to organization and individualization, assuming properties and relations always more elevated, until it at last becomes spirit, a subject that feels, and wills, and even thinks. In a word, reality is like a body, which little by little grows animate and is roused. Spirit at first diffused and unconscious gathers itself together and asserts itself as an agent.[35] This is a

[34] The statement of the *Cinici*, "Naturalia non sunt turpia," and others like it, have an ethical significance only when a regulative principle is meant by "natura," superior to mere physical occurrence; that is, when the possibility of distinguishing what facts are, and what are not natural. Such is in substance Aristotle's doctrine (cf., § 157, ante), expressed in the famous sentence, "Δεῖ δὲ σκοπεῖν ἐν τοῖς κατὰ φύσιν ἔχουσι μᾶλλον τὸ φύσει, καὶ μὴ ἐν τοῖς διεφθαρμένοις" "Non in depravatis, sed in his quæ bene secundum naturam se habent, considerandum est quid sit naturale," "Polit.," Lib. I, Cap. II (III), § 10. Here we can see another confirmation of the necessity of a distinction between physics and ethics, which is founded on the different conception of nature advanced by the two sciences. Cf. this with note by *Del Vecchio* on "L'Etica evoluzionista" in "Riv. ital. di Sociologia," Vol. VI, 1902, p. 670 et seq.

[35] The antithesis between nature and spirit takes the first step towards dissolution when we abandon the purely mechanical concept of nature (which gives us only its passive side, "natura naturata," "Natur als Objekt"), and consider it as a living entity or absolute productivity ("natura naturans," "Natur als Subjekt") from which the higher forms of existence are reached by way of the lower. This first unification or metaphysical synthesis of reality (which

very different concept of nature from that described by Schelling as being one "which was chemical and

is a forerunner, as we will see, of another in which it is resolved) can be expressed in the words of *Fichte*, "Nature raises itself by degrees in the fixed scale of generations. In simple matter there is a single being, in organism it is reflective, in plants it is formative, in animals active, and in man, nature's masterpiece, it is turned in on itself for self-examination and consideration, is double as it were, and develops from simple being, to being and consciousness at the same time. "Die Bestimmung des Menschen," p. 21. Fichte's doctrine is thus synthesized by Fischer: "No ego without development, no development without unconscious production. The last is, in its broadest sphere, called nature, it is distinguishable from the conscious as the non-ego. Nature is a necessary stage in the development of spirit. It shows a part or period of development. It is the growing ego, the unconscious spirit, the production of the intellect." *K. Fischer* "J. G. Fichtes Leben und Lehre" in "Philosophische Schriften," III, 2 ed. (Heidelberg, 1892), p. 334. Fischer forces the thought of Fichte somewhat in order to connect it with later systems. The idea of nature as the progressive and organic development of the absolute, which crowned the spirit conscious of self, was the theme of Schelling and Hegel. Vide, by *Schelling*, "Abhandlungen zur Erläuterung des Idealismus der Wissenschaftslehre" in "Sämtliche Werke," 1 Abth., 1 Bd. (Stüttgart, 1856), p. 386 et seq., where the fundamental concepts which Schelling developed in his subsequent works on the philosophy of nature are set forth. See "Ideen zu einer Philosophie der Natur, Von der Weltseele" (ibid., 1 Abth., II Bd.), "Erster Entwurf eines Systems der Naturphilosophie," (ibid., III Bd.), etc. By *Hegel*, see esp. "Vorlesungen über die Naturphilosophie," §§ 247–51. Hegel considers nature as the idea in the form of the *other* or of the external ("die Idee in der Form des Andersseyns"), as spirit which, gone out from itself, tries to re-enter into itself. "Nature is unrestrained spirit, which is wanton, a bacchic God, with no hold or rein upon itself. A thinking consideration of nature must consider how nature is a process for itself in order to become spirit and to give up its other form." (ib., p. 24; cf. p. 38 et seq). In this sense, cf. *Spaventa*, "Spirit . . . certainly presupposes nature, which has always been called the first mother and teacher. But nature teaches and produces spirit only inasmuch as it is in itself spirit." "Studi sull' Etica di Hegel," p. 60. Let us note, finally, that even the metaphysics of *Schopenhauer*, which in many

pharmaceutical."[36] But it is such a concept, more developed philosophically, which places us in a direct and intimate relation with reality, of which we are part. It is this concept which gives the reason for our infinite and mysterious love of nature, since it shows the deep identity of our being with the universal being.[37]

respects is opposed to that just given, considers nature as an extrinsification of the absolute (here known as will, rather than idea), and sees in the different modes of existence the stage of its development tending toward organic life and consciousness. See, on this universal tendency or "straining of wills for higher objectivation," esp. "Die Welt als Wille und Vorstellung," § 27; where we may note an express reference to Schelling's philosophy.

[36] In a letter to Fichte, dated October 3rd, 1801, vide "Fichtes und Schellings philosophischer Briefwechsel" (Stuttgart, 1856), p. 103. Vide, also, by *Schelling*, on the divers ways of considering nature, the empirical and the philosophical, and on the insufficiency of the former, "Erster Entwurf eines Systems der Naturphilosophie," p. 13, and Introd., ib., p. 284 et seq., "Fernere Darstellungen aus dem System der Philosophie" in "Sämtliche Werke," IV Bd., p. 342 et seq., "Vorlesungen über die Methode des academischen Studium," 3 Ausg. (1830), p. 242 et seq., in "Sämtliche Werke," V Bd., p. 318 et seq. Cf. *F. Medicus*, "Kants Philosophie der Geschichte" in "Kantstudien," VII Bd. (1902), p. 173. The observations by *E. Hartmann*, "Kategorienlehre," p. 470, are in point, "Nobody must ask natural philosophy to confuse in its study the causal and teleological definition or to exchange their points of view temporarily; such a proceeding would rather be a mistaking of the problems of two branches. But one can obtain from the student of natural philosophy as of every other branch a broader sphere of knowledge than one's own specialty, in other words, a cultured man must assign their true values in nature to teleological considerations and to real objective finality, which, as a natural philosopher, he cannot do. He must never mistake the boundaries of his own branch for the boundaries of human wisdom in general, and throw aside everything lying outside his own subject as unwisdom." See, also, for limitations placed on scientific naturalism, *Rickert*, "Die Grenzen der naturwissenschaftlichen Begriffsbildung," esp. p. 625; *Eucken*, "Geistige Strömungen der Gegenwart," 3 ed. (Leipsic, 1904), p. 220 et seq. and passim; *Bauch*, "Ethik," p. 57 et seq.

[37] "Love of nature" is really nothing but a form of man's knowledge

that he is a universal being and part of the absolute. In fact, an elevation or quasi-purification "sub specie æterni" of individual consciousness accompanies each revival of the love of nature. Inversely, each lessening of such sentiment (for example, because of a dogmatic opposition of the natural and divine) is followed by an analagous depression of self-consciousness, an alteration or perturbation of the dignity of man. Even historically the cult of nature appears in conjunction with humanism; the two concepts are strictly complementary. It can be seen, in fact, that love of nature developed and waxed strong during the Renaissance practically in proportion to the renewed sense of the human (cf. *Del Vecchio*, "Diritto e personalità umana nellà storia del pensiero," p. 12 et seq.). For Bruno, as Fiorentino pointed out, "nature was not only a study but a love. Bruno felt that he was vital with its life, felt the infinite in it, which burnt and agitated his own breast; hence he loved nature and in nature God, the living God, who was in the immensity of space and in the depths of his consciousness. What a difference between nature in the eyes of Bruno and that pale weakling which occupied its place in the Middle Ages! At first every sin and degeneration was attributed to it and then it was made the true and faithful image of God!" *Fiorentino*, "Telesio," Vol. II, p. 46. We can note here as an illustration of the connection we have emphasized, that the deep love of nature which inspired Rousseau, for example, was practically one with his consciousness of the infinite value of human personality, ultimately reducible to what there is ulterior and superior to phenomena in the external world as well as in the subjective being. In this irresistible feeling, which shows the way to continuous and fruitful confronting of fact to principle, of the temporal to the eternal, and which, is, therefore, one of the essential prerequisites of ethics, lies the true importance of Rousseau's work, and the reason for his great historical efficiency both in politics and speculation. Rousseau's influence on all subsequent German idealism, for example, can be seen by reading *Fester*, "Rousseau und die deutsche Geschichtsphilosophie" (Stüttgart, 1890); cf., also, *Levy-Brühl*, "L'influence de J.-J. Rousseau en Allemagne" in "Annales de l'école libre des sciences politiques," II, 1887, p. 325–58. The "return to nature," agitated and championed by Rousseau in all his writings, is, as shown by a careful study, an act of the spirit. It is the return of man to himself to hear and obey the living voice, which calls in the depth of his consciousness. *Höffding*, who distinguishes three different meanings given by Rousseau to the word "Nature" (the "theological," "natural historical," and "psychological concept of

nature"), admits finally that the last is the only fundamental and constant one, in other words, is the concept of nature, which Rousseau obtains "by means of introspection," since Rousseau, he observes, "wanted to teach men to trust their own hearts, to fall back on themselves, instead of relying on external relations, — to find in internals the source of all good and happiness. In this meaning of the words he is called the champion and defender of nature." "Jean Jacques Rousseau og hans Filosofi" (Copenhagen, 1896), translated into German as "Rousseau und seine Philosophie," 2 ed. (Stüttgart, 1902), p. 100–103. For the concept of nature in Rousseau, cf. *Del Vecchio*, "Su la teoria del contratto sociale," (Bologna, 1906) pp. 26, 32 et seq., 88; and "Ueber einige Grundgedanken der Politik Rousseau's" (Berlin, 1912).

# CHAPTER IV

## PRIMACY OF THE EGO OVER NATURE AND THE FOUNDATION OF ETHICS

CONDITION OF MAN IN NATURE. — THE WORLD AS A FUNCTION OF THE EGO AND THE LOGICAL PRIMACY OF CONSCIOUSNESS. — OBJECTIVE AND SUBJECTIVE ORIENTATION. — NEED OF SUCH ORIENTATION FOR ETHICS. — ABSOLUTE QUALITY OF THE PERSON AND THE SUPREME NORM OF ETHICS. — THE POSSIBILITY OF THE IMPERATIVE. — DOUBLE QUALITY OF MAN AND THE VIOLABILITY OF THE NORM.

§ 163. *Condition of Man in Nature.* Such, in fact, is the condition of man in nature; that, on one hand, he is included and enters into it as the last and highest term in the system of formations and developments, and, on the other, in the constitutive and characteristic quality of a thing as subject, he is reflected in nature, epitomizes it in himself, posits and fixes it as his idea.[1] From this higher point of view the world is no longer something extrinsic, but is properly a function or representation of the ego. Subjective knowledge, which appears as the last term in the order of growth, is the first in the logical order,[2] because before or without it no datum, phen-

[1] "It is by one and the same stairway," wrote *Bruno* grandly, "that nature descends to the production of things, and the intellect ascends to their cognition; both proceed from unity to unity, passing by a number of means." "De la causa, principio e uno," Dial. V., Vol. I, p. 247.

[2] "Τὰ ὕστερα τῇ γενέσει πρότερα τὴν φύσιν ἐστι, καὶ πρῶτον τὸ τῇ γενέσει τελευταῖον. Τῷ μὲν οὖν χρόνῳ προτέραν τὴν ὕλην

omenon, or experience is possible. All these are clearly relative terms, which have no meaning "per se," but only in respect to another term, which by logical necessity is precedent, that is, the mind of the agent. No experience is possible without him who experiences, no datum without some one to receive it, no phenomenon unless there is some one to whom it is manifest. All things, therefore, necessarily correspond to their ideas, inasmuch as they are logically determined and qualified by the latter.

§ 164. *Ego the Absolute Principle.* Such a conception of the world, in which the ego (not as empirical personality but as the organ of ideas) upholds itself as the absolute autonomous principle, involves and includes all the other conceptions which we have considered so far. And we have said from time to time (in a measure anticipating this final review) that all the different interpretations and all the different concepts of nature resolve in the last analysis into particular relations or functions of the intellect. It would, therefore, be absurd and paralogical to use any of the inferior particular relations to attack or avoid this last, which is their basis, and the most universal, comprehensive, and certain among them.[3]

ἀναγκαῖον εἶναι καὶ τὴν γένεσιν, τῷ λόγῳ δὲ τῆι οὐσίαν καὶ τὴν ἑκάστου μορφήν." *Aristotle*, "De Partibus Anim.," II, 1 (646a, 25).

[3] "Of all the mistakes of the human mind," as *Lotze* well says in his "Mikrokosmus," 1 Bd., p. 296, "it seems to me the strangest for it to doubt its own peculiar being, of which alone it has direct knowledge, or to consider itself the product of external nature, which we know either at second hand or through the indirect knowledge of the spirit, which we deny." Cf., pro, the elementary canons of critical idealism, and contra, the paralogisms which overcome it, *Green* "Prolegomena to Ethics," edit. by Bradley (Oxford, 1883), p. 13 et seq.; *Petrone*, "Il diritto nel sistema della Filosofia dello spirito" (Naples, 1906), p. 35 et seq.

§ 165. *Causality and Determinism.* From the standpoint of causality, everything in the world appears determined. Freedom seems confined to a narrow and unavoidable chain of causes and effects. But it reappears unimpaired and dominant when the law of causality is thought of as fixed and emanating from consciousness, intrinsic in man, who in a certain sense models his experiences and acts according to it. The series of causal determinations does not destroy the logical primacy and absolute autonomy of the ego, because these determinations, no matter how much they extend and multiply, are always enclosed in parentheses —in other words, dependent on and enclosed in consciousness, which constitutes their fundamental law and irreducible limit.[4]

[4] The recognition of the subjective quality of the law of the concatenation of facts signifies the freeing of the spirit from the apparent servitude in which it would lie by reason of the law itself, if this were extrinsic. This is, in substance, the reasoning of *Fichte*, who in an imaginary dialogue attributes to the spirit, his questioner, this lofty admonition: "With this insight, mortal, be free, and forever lose the fear which has humbled and tormented you. You are no longer a pawn of the necessity which is in your mind, you are no longer to be oppressed by the fear of things which are your products, you are no longer to place thought in the same class with your other products. So long as you are able to believe that a system, which you have made up for yourself, can exist in reality independent of you, and that you yourself are but a link in the chain, fear will grind you down. But, now you have insight that all this is in you and through you, and you without doubt have no fear of yourself, whom you know for its proper self." "Die Bestimmung des Menschen," p. 76. Cf. *Schopenhauer's* remarks in "Memorabilien," edit. by Frauenstädt (Berlin, 1863), p. 725 et seq. Cf. *Simmel*, "Die Probleme der Geschichtsphilosophie," p. viii et seq. "Men, who are known, are made by nature and history; man, who knows, makes nature and history." Thus *Croce* in "Cio che è vivo e cio che è morto nella Filosofia di Hegel" (Bari, 1907), p. 205, "Nature, in its concept, is a product of the praxis of man, who, only because he forgets the path

§ 166. *Objective and Subjective Orientation of Thought.* Thus by an internal criticism of reason, the antinomies, which were first found in the concept of nature, are made clear. To the objective orientation of thought by which everything is considered in the order of its external genesis, according to the mechanical connection of antecedents and consequents, we must oppose subjective orientation, which corresponds to the final degree of self-knowledge and reflection. That is to say, we must superimpose or add to it the certainty that the world is our representation or a positing of the ego, and whatever exists or happens in the world always necessarily conforms to the idea according to which it is learnt, and which contradistinguishes it in its own essence. A fact or empirical datum, which by the former conception seems simple and original, is recognized by the latter as the second term of an equation, whose absolute basis and "a priori" law is in every case the man himself. While from the first point of view consciousness is looked upon as a derivative from the world and an incident of it, like some kind of phenomenon, by the second the profound truth of the opposite thesis is recognized, which shows the world as essentially subordinate to the determinations of consciousness. Our being, subjectivity in general, which by the first test almost vanishes and becomes a transient and insignificant phase in the indefinite sequence of facts, is reaffirmed by the other point of view as the principle, basis and condition of every possible fact, as the *place of ideas*, in whose function everything develops and *takes place*.[5]

he has travelled, finds it before himself as something strange and frightful in its aspect of impenetrable mystery."

[5] "In every man, in every individual, there is a world or universe," so wrote *Bruno* in "Spaccio de la bestia trionfante," "Epist. espl.," Vol. II, p. 12. Comp. with this, *Schelling* in "Philosophische Briefe

§ 167. *Speculative Foundation of Ethics.* Remember that this supreme degree of knowledge, where the ego recognizes itself as the principle of the world, has not only a great theoretical but a practical value as well, forming, as it does, the basis and the essence even of ethics. All our acts are necessary and not valuative as long as we consider them natural phenomena, that is, in the physical sense. They only acquire an ethical meaning and value, when we refer them to man as their absolute principle.

§ 168. *Ethics are the Basis of Morals and Law.* While, therefore, other ways of considering reality are theoretically legitimate, this last alone is practically admissible and necessary, for it is the only way which meets the demands of the sciences, dealing specifically with the valuation and norms of action. Reference to subjectivity and a reduction of the objective to terms of individual creation and emanation from the ego make the foundation of morals and of the philosophy of law possible. As long as we consider human acts in their

über Dogmatismus und Kriticismus" in "Sämtliche Werke," 1 Abth., 1 Bd., p. 318 et seq., "There dwells hidden within us all a wonderful power to withdraw from the mutations of time into our very selves, unaffected by any influence which may come from without, and there under the form of the immutable gaze upon the eternal within us. This vision is our deepest, most peculiar experience, on which everything depends which we know and believe of a supersensual world. It first convinces us that there is something that actually *is*, while all else only *appears*. At the moment of this vision, time and duration disappear for us; we are not in time but time — or rather not time but absolute eternity is in us. We are not lost in the vision of the objective world but the world is lost in our vision." This fundamental doctrine is common to all philosophies which are not superficial. We may recall that Schopenhauer in the passage cited called it a "great and pure truth." Vide "Anmerkungen zu Schelling," edit. by Grisebach, "Aus Schopenhauer's handschriftslichem Nachlass," III Bd., p. 128.

empirical aspect, as they enter into the causal succession of objective nature, we will be able at most to trace the history, but never to create a philosophy of them. Of course it is possible to give a materialistic explanation of juridical and moral institutions as of everything else, inclusive of psychic functions, and we can show the connection in the phenomenological order between these institutions and the physical conditions of environment. We have considered them on their reverse side. But, with this, we have obtained only a partial explanation, a reflected view of morals and law, as, to use a metaphor, he who in looking at a portrait by a great master, considered only the chemical composition of his colors, would not grasp the true essence of the picture.

§ 169. *Absolute Character of the Ego.* The only principle that gives a strict and adequate view of the ethical world is that which recognizes the absolute quality of the ego, the logically existing supremacy of man over the objective world. The faculty of abstracting and precipitating oneself out of nature, or of referring all reality which converges in the ego to it by way of ideas, forms the proper and specific being of man, his nature in an eminent sense. This faculty or transcendental vocation is affirmed psychologically by the knowledge of freedom and imputability (conscience, which the spirit cannot overcome or disregard) and is converted by man into the supreme norm. Act not as a means or vehicle of the forces of nature, but as an autonomous being having the qualities of being and finality; not as driven and controlled by extrinsic motives, but as dominant over them; not as part of the sensible, but of the intelligible world; not as an empirical individual, as "homo phænomenon," governed by physical passions and impulses, but as a rational ego

or "homo noumenon,"[6] independent of such influences; in a word, act with a knowledge of the pure spontaneity

[6] See for these Kantian terms, "Met. Anfangsgr. d. Rechtslehre," p. xlviii. But, for the intelligible or metaphysical quality of man in antithesis to his sensible or physical side, see more than any other part of Kant, "Krit. d. prak. Vernunft," Erst. Th., 1 Buch, III Hauptst. Cf. "Krit. d. rein. Vernunft," Transcend. Elementarlehre, II Th., II Abth., II Buch, II Hauptst., III, p. 428–445. In this doctrine, it seems to us, lies the basis not only of the Kantian system but of critical idealism in general, also in its ulterior developments since Kant. On the other hand, we can see that this doctrine was somewhat anticipated and outlined whenever regard was had to the foundations of morals. *Rousseau* shows this, for example, in the "Profession de foi du vicaire savoyard," in "Émile," L. IV, where there is the spirit of the Kantian theory, if not his philosophical rigor of formula, "Meditating on the nature of man, I thought I discovered two distinct principles, one of which tended to the study of eternal truths, to love of justice and morality, to the realms of the intellectual world in whose contemplation lies the pleasures of the wise man, and the other of which was basely self centered and betrayed man to his senses, and to the passions which minister to them. . . . Attacked by these two contrary movements, I wondered, 'No, man is not single, I want and I do not want, I am both slave and free. I am active when I listen to reason, passive when passion holds sway. And my worst torment when I succumb is to feel that I could have resisted.'" As to the relation in ethics between Rousseau and Kant, vide (besides *Fester*, "Rousseau und die deutsche Geschichtsphilosophie" and *Levy-Brühl*, "L'influence de J.-J. Rousseau en Allemagne") *Dieterich*, "Kant und Rousseau" (Freiburg, 1885); *H. von Stein*, "Rou-seau und Kant," in "Deutsche Rundschau," XIV Jahgr., (1888), pp. 206–17; *Höffding*, "Rousseaus Einfluss auf die definitive Form der Kantischen Ethik" in "Kantstudien," II Bd. (1898), pp. 11–21; *Menzer*, "Der Entwicklungsgang der Kantischen Ethik in den Jahren 1760 bis 1785," ibid., esp. II Bd., p. 298 et seq.; *Delbos*, "La philosophie pratique de Kant" (Paris, 1905), p. 115 et seq. In these books the exact words of Kant can be found, concerning the influence of Rousseau's works in the formation of his thought. Among the post-Kantian developments of this doctrine, we must remember in the first place those of Fichte (esp. in "Die Bestimmung des Menschen"), and of Schelling (in the earlier phases of his thought, see esp. "Abhandlungen zur Erläuterung des Idealismus der Wis-

of your decisions, of the absoluteness and universality of your being, and, therefore (for its meaning is nothing less), of your substantial identity with the essence of every other human being.

§ 170. *Obligatory Force of the Absoluteness of the Ego.* Such is the fundamental ethical law, based on the very essence of man, because and inasmuch as it transcends the physical nature. The necessity of obeying this norm is shown by the deep and basic feeling which reveals every man to himself in his own nature and is not learnt or suggested from without, but is the negation of all exteriority. Consciousness itself at once shows the necessity of acting as subject and not as object, that is, with a suprasensible intent, which envelops acts not only as phenomena, but also as ideas, giving them a scintilla of eternity.

§ 171. *The Ethical Imperative.* If man were simply a phenomenon, he would have no ethical problem and be bound by no ethical imperative. Human acts, as phenomena necessarily conforming to nature, would be susceptible of no ulterior critical test, or valuative judgment as to their legitimacy or illegitimacy. Under these conditions, existence would be, as it is in the physical sciences, the criterion of truth. But since man belongs to the phenomenal order, and is and feels intimately that he is something more than a phenomenon, the explication of his own nature and the desire to be himself are not data, but a problem and goal for him. The apparently tautological "Be thyself" expresses, in fact, a synthesis whose fulfillment is incumbent upon him, and which continues to confront him as long as he lives. Such existence really implies crises, which he is constantly called upon to overcome, establishing

senschaftslehre," p. 396 et seq., p. 404 et seq., where the ties with the Kantian philosophy are set forth).

a certain relation or equation more or less perfect between himself and the external world. And this very relation, that is, the method by which man little by little overcomes the antithesis between his internal and external being (as a phenomenon), forms his behavior or practical activity, and is the object of ethical valuation in general. Ethical valuation, therefore, deals with an essentially metaphysical relation, and is only possible where it is based on a criterion which transcends phenomena.

§ 172. *Double Quality of Man.* The imperative is dominant because of this peculiar condition of human essence, that it partakes as it were of two natures, or rather belongs to both orders of reality, the physical and the metaphysical, being both a part and the principle of nature.[7] While, as part of nature, man always acts in conformity with its laws (physical) and his acts are necessarily coherent with all other phenomena, there is no room for distinction between good and bad, nor for true imputation of merit or fault (since strictly it is not the individual that acts, but nature in him); on the other hand, regarded as the principle, in his quality of an intelligent being, man has in himself the possibility of decision, and nature is only the means or place where his decisions develop and take sensible form. Human action is then weighed on another scale; no

[7] "I stand," writes Fichte, "at the middle point between two opposing worlds — one visible, in which fact governs, one invisible and entirely incomprehensible, in which will governs; I am one of the original forces in both worlds. It is my will which binds both. This will is 'per se' a constituent part of the supra-sensible world. This will also acts in material fact and belongs in the material world, and acts in it, when it can act." *Fichte*, "Die Bestimmung des Menschen," p. 120 et seq.; vide, also, p. 29, 126 et seq., 152. Cf. *Kant*, "Krit. d. prakt. Vernunft," esp. p. 105 et seq., 118, 138.

longer in an empirical relation, which binds it to antecedents and consequents, but in its transcendental independence of the noumenal being of man. It is not explained simply as a phenomenon of nature, but is valued as an expression of freedom, that is, by the criterion given by the intimate being of man. In this respect it forms its true and characteristic law;—a law, therefore, not physical but metaphysical, which is equal to its powers of teaching and commanding a new and higher status which man can attain, because its principle lies within himself, and whose attainment is necessary for his true self-development. Of course he can fail to comply with this law, and still exist physically, that is, without losing his inferior quality as a part of nature. His acts contrary to these laws, like those in conformity with them, are always physically explicable, and the necessity of those which happen in the empirical series will always be affirmable and comprehensible. But — and this judgment is independent of the one first given, for it does not concern the existence of acts as phenomena, but their suprasensible relation with the personality of the agent — such acts lack the second and higher kind of reality (ethical) which can and should be derived from man besides the physical reality of all acts. And whoever denies his quality of principle betrays his own nature. "Ipse se fugiet," to quote Cicero, "ac, naturam hominis aspernatus, hoc ipso luet maximas pœnas, etiamsi cetera supplicia, quæ putantur, effugerit."[8] The law of action epitomizes and affirms, as it were, the being of man in his highest theoretical determinations, that is, in his quality of autonomous principle above the world of sensible

[8] See Cicero's beautiful passage on "vera lex" in "De Repub.," III, 17 (22). The fundamental thought is clearly Stoic. Cf., also, "De Leg.," 1, 6, "Pro Milone," IV, 10.

objects. The absolute raising of the ego above phenomena, which is the end of theoretical philosophy, is, on the other hand, the beginning of ethics.[9]

[9] This truth, of capital importance for philosophical progress in general, can be said to be implied in Kant's doctrine, and is more especially apparent when the relation between the two primal critiques is considered. An explicit statement of it can be found in *Schelling*, "System des transscendentalen Idealismus," p. 524, "But this activity, which is absolute abstraction (that is, that in which 'the ego raises itself over all objects'), while absolute, just because it is no more explicable to the intelligence, breaks the chain of theoretical philosophy, and only remains the absolute maxim. There should be such an activity in the mind. But hereby theoretical philosophy oversteps its boundaries, and enters the jurisdiction of the practical, which is based on categorical necessity."

# CHAPTER V

## DEDUCTION OF THE PRINCIPLE OF LAW

TWO FORMS OF ETHICS: MORALS AND LAW. — LOGICAL BASIS OF DISTINCTION. — PRINCIPLE OF MORALS. — INDIVIDUAL CONSCIENCE AND DUTY. — PRINCIPLE OF LAW. — AUTONOMY AS RULE OF THE RELATIONS OF GROUPS. — VALUE OF SUCH PRINCIPLE IN RELATION TO POSITIVE LAW AND THE LOGICAL FORM OF LAW.

§ 173. *Two Forms of Ethics: Morals and Law.* The fundamental law of action, of which we have spoken,[1] necessarily takes on two distinct forms or phases, which correspond to the two universal ethical categories of morals and law. From law (as from any ethical principle applicable to acts in general) two different kinds of determination or valuation are logically deduced, inasmuch as it is both subjective and objective. The first conception is had when acts are considered in relation to their agent "a parte subjecti," thus commission and omission are logically opposed; the second is followed when acts are considered in their possible objective interference with those of other agents, thus permission and prevention are opposed. The ethical qualifications have, however, in the first case only the form of positive or negative necessity (moral duty, exercised by the agent over himself); in the second, on the other hand, they are resolved into a correlative and reciprocal series of possibilities and impossibilities, wherein the behavior of several agents is co-ordinated

[1] Cf. § 168, ante.

and limited. The necessity in such a case is shown, therefore, only as the limit of the possible, and has an objective meaning and value, inasmuch as it necessarily corresponds to a claim of another individual. Such is briefly the logical form of law which, however, always presupposes that an ethical principle must be expressed in both form of morals and of law, that is, be a coherent juridical thesis.[2] By reference to the law already given, in which we have placed the highest criterion of ethics in general, it is easy to see that it contains in effect the principles of both categories. From this, in the first place, comes moral duty, which makes it incumbent on every man, "qua" man, to conquer by his absolutely free determination all his own interior motives and particular and sensible impulses, and thus to give his acts the universal character of reason. In a word, man should transcend in his deliberations his physical existence as an individual (for this is particular) in order to affirm himself in his quality of principle as a rational or universal being, until he identifies his being with that of every other man. This identification, which cannot be understood and is not possible in the order of phenomena but only in a suprasensible realm, is shown in moral consciousness, which is the last word of morality. Whoever acts morally or "in accordance with his conscience"[3] leaves all that which forms his empirical individuality and takes his place "sub specie æterni," giving his conduct a typical value. He

[2] On these formal relations, sketched here, esp. § 106, et seq., ante. Note the definition in § 142, "Law is the objective co-ordination of possible acts among men, according to an ethical principle which determines them and prevents their interference."

[3] Moral consciousness, which is here meant, is the highest stage of psychological consciousness, in other words that degree in which the agent understands himself in his universality of principle, and so weighs his acts.

acts as humanity acts in him or as any other would act in his place. His will is purified and absolute. Ascending from the empirical to the metempirical, from the sensible to the intelligible, from the particular to the universal, man finds at last in himself the principle common to all mankind and includes all objectivity in his determinations. Anyone who looks upon morality in its extrinsic aspect seemingly reduces it to the duty of acting "as others act," but this empirical formula represents only its reverse impression. The truth is, on the contrary, that man should attain by himself the universal rule of activity, so that all can act as he does.[4] This implies and shows the necessity of that internal process in which individual consciousness is sublimated and transfigured. Beyond the sphere of empiria consciousness becomes ruler as well as subject. In this agreement of two phases lies the essence of morality.[5] This is, however, only the subjective meaning of the general principle which we have given. In this first respect, ethical law as a criterion of morality shows the agent how he should act, what he should do, and what he should omit. But ethical law has, as we have seen, also another meaning and gives another series of applications, in which it deals with the same acts from

[4] This was pointed out by *Schelling* in "Neue Deduktion des Naturrechts," § 41, in "Sämtliche Werke," 1 Abth., 1 Bd., p. 254; "I should not act as others, but as I act so should others. But in order that the rest act as I act, I should act as others can."

[5] It would be easy to show that the maxims and precepts which form the inherent content and truth of the morals of various peoples, as well as of various philosophers, substantially conform and can be reduced in some way to the fundamental concepts which we have given. We know that however much the methods and manner of proof differ, the principles, reached in different ways, are generally in accord. We can say that there is no dissension of importance on the supreme truth of ethics, although its theoretical proofs are often inadequate and even erroneous.

an objective and juridical point of view. Conduct is then determined, not according to one's duty, simply, but according to its possibility or impossibility in relation to the acts of others. In other words, it is dependent upon whether it has such value as to entail prevention or respect on the part of other men. This second form of ethical determination (juridical) is, by logical necessity, congruent to the first (moral).[6] It is equally valid and categorical, and develops with it. In the fact which generates in man, the necessity or duty of acting as an autonomous principle, lies the faculty or right to so act in regard to others. It gives him the right ("Anspruch") to non-interference by others. As the objective condition of ethics (we cannot otherwise describe a right), there is a perpetual and constant prerogative of the person, a universally valid and trustworthy claim, and there is, because of the universality of this claim, a correlative obligation on the part of everyone to respect the bounds, beyond which opposition would be justified and legitimate.

§ 174. *Principle of Law.* Law, as well as morals, has its principle in the nature or essence of man. It is distinct from the latter, and constitutes a specific criterion of the valuation and determination of acts, by the objectivity of the relation in which it places and protects the absolute quality of personality. The possibility, proper to man, of living in a suprasensible universe, and attaining, in his consciousness of an absolute being, the reason of his deliberations (a possibility which we have recognized as the basis of ethics in general), acquires a specific juridical meaning when it appears as the criterion and rule of all social relations. In this sense

[6] Congruent but not coincident, in which case the two forms and their respective sciences would be reduced to one. For the specific relations of morals and law, cf. § 107, ante.

it is advanced as the maxim that every man can, merely because he is man, advance a claim not to be forced against his will into any relation with another. He can advance a claim not to be used by anyone merely as a means or instrument. He can demand respect, as he must give respect in return to the imperative: "Do not extend your caprice over others, do not aim to subject to yourself those who are subject to themselves alone." By this principle or idea-limit, of the properly universal law of personality, fixed and inexhaustible in every concrete relation of society, all social relations must be measured and made, so that each one of them, of whatsoever kind it may be, will bear its impress and will presuppose and imply the recognition of the high worth of autonomous being, of which it must be in fact an exercise or function.[7]

§ 175. *Value of this Principle in Relation to Positive Law.* This is not the place to give in detail the consequences and applications of this principle. Their name is legion. It is better for us to show how the principle itself is deduced "a priori" from reason, and how it results from the simple essence of subjectivity in general. The mentioned right, like the corresponding duty, is conditioned upon no fact, and depends on no historical institution or sanction of any kind, but has an absolute

[7] It seems difficult to understand upon a superficial examination how the foundation of relations of society can consist in an absolute right of the person and in a quasi "right to solitude". . . . But the paradox is only apparent. In fact the absoluteness of the individual right does not prevent the formation of restraint and social relations, but rather implies the need that in every case such a structure be based on the presupposition of the autonomy of its components. Such is exactly the condition of the legitimacy of the relation.

[If the author had used the plural in the above note, viz., "In fact the absoluteness of individual *rights*," etc., his conclusion would have appeared more inevitable. — *Tr.*]

value and appertains to any man because of his nature alone. In society and in history, such a right can and should be recognized and respected, but it is "per se" anterior to any application or social relation, since it contains the law which governs the application or relation. Its value extends beyond the limits of time and space. The further fact that empirical reality does not always conform to such law is undeniable, but can be explained in the same way as the violation of any ethical truth. The right remains unaffected, retaining its significance and value, because it belongs to the metaphysical rather than to the physical order. The subsistence of a juridical principle is never affected, but is in fact logically confirmed by its recognition in the violation. The recognition of injustice is only possible by a reference to the criterion of justice, which is implicitly admitted thereby.[8] We may note that a social order, whatever it be, necessarily presupposes a law. Every society has, therefore, by definition its law, which is positive when historically promulgated and realized, as the expression and effect of the dominant social force. Positive law is always a fact which, as such, can also not correspond, or correspond only imperfectly, to the absolute principle of justice. In other words, natural law is not upheld by the positive, but acts in relation to it, as the measure or type of the rationality of its content.

§ 176. *Value of this Principle in Relation to Logical Form of Law.* The juridical quality is "per se" (as we have elsewhere shown) purely formal, so that one juridical institution can be not only different, but opposed to another. This does not mean that all juridical institutions are of equal value,[9] but shows that the criterion of

[8] Cf. for a fuller discussion, § 98 et seq., ante.

[9] This would be the thesis of "moral scepticism," referred to by *Ravà* in "Il socialismo di Fichte e le sue basi filosofico-giuridiche"

their value cannot be given by the very concept of law, but must be found elsewhere. By our deduction we have found the principle that enables us to make a rational appreciation of the intrinsic content of law, which satisfies a philosophical demand very distinct from that of conceptual definition, although equally fundamental and necessary. Whoever considers the institution of slavery, for example, must recognize that it is juridical, since it has and requires all the formal qualities of law. He must recognize, too, its historical existence as a fact, and that it is natural in the sense that where it manifests itself it appears necessarily determined by empirical conditions. But all this does not prevent him recognizing that, compared with the idea of the intrinsic justice, that is, confronting its content with the content of this idea, it represents a violation or negation of the latter. It shows, we may say, the form but not the content of justice. It is juridical but not just. It is positive law but is contrary to nature, inasmuch as it contradicts a categorical and absolute demand of the latter, founded not on phenomenon but on the essence of man. There is, in this case, an antithesis between the ideal and the empirical (which must, however, be included in the logical class of law), between duty and fact, between the postulate of reason and the manifestation of experience. This antithesis speculation shows and analyses critically, and does not hide or suppress by an arbitrary "a priori" identification of its two terms. For thus "the royal road" of criticism would enter one of the blind alleys of

(Milan, 1907), p. 35. Such scepticism would be inevitable if no study, except the logical, tending to the conceptual definition of "genera," were considered legitimate by philosophy. Contrary to this and contrary to a formal concept of the philosophy of law, vide Pt. I, Chap. III, and §§ 52, 60, and 182, ante.

dogmatism. Equally erroneous with the refusal to recognize or conceive of a juridical fact whose content does not accord with the ideal is to ignore the ideal and its value, because it is not found effective in juridical experience;[10] true respect for an ideal does not lie in an "a priori" supposition that it exists in fact, for such a unification would tie its fate to that of physical reality,[11] but in considering it as it is, essentially superimposed on reality, where it lives and flourishes even when it is contrary to physical events. So natural law exists unchanged in its sphere and "burns with unwonted splendor," as Rosmini said,[12] even when violated in fact and denied by positive law.

[10] Those, who, like *Croce* (v. "La Critica," Vol. III (1905), p. 515 et seq.) and *Vidari* (v. "Riv. filos.," Vol. VIII (1905), p. 676 et seq.) do not accept the distinction which we have made between the concept and ideal of law, that is, between the logical and deontological problems, must come to one or the other of two conclusions. They must refuse to accept law as a part of juridical phenomenology, which would not correspond to a definite principle or type, or else refuse to oppose any ideal to all that which has been historically held as law, regardless of its iniquity or irrationality. On the first hypothesis, making the juridicity of legislation depend upon its intrinsic perfection, that is, on the value of its content, we repeat with the Scholiasts, "Omnis lex humanitus posita — si in aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio." *Thomas Aquinas*, "Sum. Theol.," 1, 2, Qu. 95, Art. 2; cf. *Suarez*, "De Legibus ac Deo Legislatore," III, 19, "Lex injusta non est lex," and finally we come, to our cost, to free the doctrine of law from all objective and integral elaboration of fact which historical reality gives it. On the second hypothesis, on the contrary, subjecting speculation to history, we state, at least implicitly, the equal rationality of all facts, as if all that is juridical is just. The consequence would be a supine adoration of fact or an a prioristic cult of history; in which Hegelian and positive dogmatism could meet, but never critical idealism.

[11] Hegelian panlogism, notwithstanding its effort to avoid it, falls into this error.

[12] "Filosofia del diritto," Vol. I, p. 126.

# CHAPTER VI

## SOME PARALOGISMS TOUCHING THE CONCEPT OF NATURE IN THE PHILOSOPHY OF LAW

UNCERTAINTIES DOMINANT IN THIS MATTER. — THE STATE OF NATURE AND EMPIRICAL POSITION OF THE PROBLEM. — THE NATURAL IN THE SENSE OF PRIMORDIAL: NATURE AND THE BIRTH OF THINGS. — LOGIC OF THE GENETIC CRITERION AND THE INCONSEQUENCE OF THE JUS-NATURALISTS. — SPINOZA. — ANTITHESIS OF THE NATURAL AND THE HUMAN. — CONFUSION OF THE PRIMITIVE AND THE EXEMPLARY: THE MYTH OF AN IDEAL PAST IN THE DOCTRINES OF THE PHILOSOPHY OF LAW. — ORIGIN AND FUNCTION OF THIS KIND OF ERROR.

§ 177. *Uncertain Connotation of the Word "Nature."* Our precedent analysis has enabled us to state citically the idea of natural law, whose history has been long and constantly harassed with controversies. The number of dissensions on this subject can be ascribed, at least in part, to the different meanings given the word "nature."[1]

[1] *Lask*, "Rechtsphilosophie" in "Festschrift für K. Fischer," II Bd. (1905), p. 7, pointed this out, "In the phrase, 'natural law' are hidden many different meanings of the word 'nature,' few of which are satisfactory." "Few terms used in philosophy," writes *Dewey*, in his article "Nature," "have a wider or a looser use, or involve greater ambiguity." "There are few concepts involving so many misuses or entailing so many fallacious ideas as that of the 'natural'." *Simmel*, "Einleitung in die Moralwissenschaft," 1 Bd., p. 86. "The words 'nature' and 'natural' are constantly bandied about in controversy as if they settled quarrels, whereas they only provoke

Some (Hume, for example) thought the discussion as to whether justice is natural or not was useless.[2] It is

them by their ambiguity." *Ritchie*, "Natural Rights," p. 20. To the same effect, *Lewis*, in "Remarks on the Use and Abuse of Some Political Terms," p. 125; *Lieber*, "Manual of Political Ethics," 2 ed. (Philadelphia, 1876), Vol. I, p. 68; *Austin*, "Lectures on Jurisprudence, or the Philosophy of Positive Law," 5 ed. (London, 1885), Vol. II, p. 573 et seq.; *Huxley*, "Natural Rights and Political Rights," in his "Essays" (London, 1903), p. 93. Cf., further, *Rickert*, "Die Grenzen der naturwissenschaftlichen Begriffsbildung," p. 209 et seq., 714 and passim. The ambiguity appeared even in *Aristotle*, who wrote that in one sense the family naturally takes precedence of the State ("Nic. Ethics," VIII, 12, § 7), and in another that the State takes precedence of the family and the individual. ("Polit.," I, 2, § 12.) Cf. *Ritchie* (op. cit.), p. 28. The confusion between the physical and normative concepts of nature reached its height with the Stoics, and dominated ancient philosophy in general. Vide, for example, *Cicero*, "De Finibus Bonorum et Malorum," Lib. III, Cap. 5 et seq.; "De Legibus," Lib. I, Cap. 12, Lib. III, Cap. I, where we find this characteristic passage; "Nihil porro tam aptum est ad jus condictionemque naturæ (quod cum dico, legem a me dici, intelligi volo) quam imperium — sine quo nec domus ulla nec civitas, nec gens, nec hominum universum genus stare, nec rerum natura omnis, nec ipse mundus potest. Nam et hic deo paret et huic obediunt maria terræque, et hominum vita jussis supremæ legis obtemperat." This equivocation, by which according to *Lask* (op. cit., p. 9), "a single meaning is covertly foisted upon the varying concept of natural law" is very frequent. Vide, for example, *Affolter*, "Naturgesetze und Rechtsgesetze" (Munich, 1904), §§ 1, 11; there were some who tried to justify it, among them particularly *Schleiermacher* in an ingenious but not convincing work, "Ueber den Unterschied zwischen Naturgesetz und Sittengesetz," in his Sämtliche "Werke," III Abth., II Bd. (Berlin, 1838), p. 397 et seq., in which he attempts in substance to identify the two kinds of laws, partially destroying the rigor of each. Vide, contra, the observations of *Zeller*, "Ueber Begriff und Begründung der sittlichen Gesetze," in "Vorträge und Abhandlungen," III Samml. (Leipsic, 1884), p. 197 et seq., where is found the Kantian argument, still fundamental in this matter. Vide, further, *De Sarlo*, "La nozione di legge" in "Saggi di Filosofia," (Turin, 1896), Vol. I, pp. 5–140.

[2] "The word 'natural' is commonly taken in so many senses, and is of so loose a signification, that it seems vain to dispute whether

interesting, too, to note that although Aristotle made an attempt to make a comparative list of the various usages of the word φύσις,[3] deep critical work[4] on this subject was rarely essayed even by the masters of natural law, and the "difficilis quæstio de natura naturæ,"

justice be natural or not." *Hume*, "An Inquiry Concerning the Principle of Morals," App. III. Cf. the analogous position of *Quesnay* in "Du droit naturel," Cap. I.

[3] Vide *Aristotle*, "Met.," D, 1814 b, 4; in the new German translation by Lasson (Jena, 1907), which has value as a commentary, p. 290, et seq.

[4] One of the most painstaking disquisitions about what can be meant by nature is in the treatise "De Duabus Naturis et Una Persona Christi," attributed to Boethius ("Boethi Opera Omnia," edit. of Basel, 1570, p. 1203 et seq); (cf. on authenticity of this treatise, *Ueberweg-Heinze*, "Geschichte der Philosophie," Vol. II, p. 151). He descends according to criteria largely Aristotelian, to the most particular from the most general determination, "natura est earum rerum, quæ cum sint, quoquo modo intellectu capi possunt." The importance of this work (like the others of Boethius) lies in its having been almost a means of transition from ancient philosophy, especially the Aristotelian, to that of the Middle Ages. His arguments concerning the concept of nature, which are contained in the treatise cited, were developed in scholastic philosophy. For example the commentaries of *Gilbertus Porreta*, "De Natura," p. 1223 et seq. We can further cite not only Thomas Aquinas, Duns Scotus, but also the older Scotus Erigena, "De Divisione Naturæ," where nature is defined in different ways, according to a quadruple distinction. The fundamental antithesis between "natura creatrix" and "creata," as there shown (I, 1, cf. I, 14) contains the germs of many ulterior distinctions (for the terms, "natura naturans" and "natura naturata," cf. *Siebeck*, "Ueber die Entstehung der Termini 'natura naturans' und 'natura naturata,' p. 29). But, in general, as to what concerns the thought of that age, we may note the distinctions and subdistinctions, multiplied to excess by dialectic practice, do not result in a fecund elaboration and true knowledge of this matter. Theological and teleological dogmatism prevented the acceptance of a strictly causal concept of nature before the Renaissance. With this concept comes the critique, which afterwards revises it, showing its foundation and limitations in the system of reason.

as Thomasius called it,[5] was laid aside, perhaps because of its difficulty, whereas it should have pre-eminently occupied those who based their juridical systems[6] upon the concept of nature, especially the nature of man.

§ 178. *The "State of Nature."* The school of natural law did not occupy itself so much with the concept of nature as with what long tradition has designated as the "state of nature." The diverse denomination and position of the problem shows the cause of the greatest error of this school. This error does not lie in excess, as many believe, but in a lack of speculative philosophy; not in an excessive tendency to metaphysics but in a too ingenuous and ambiguous realism. The essentially transcendental problem of nature is made an empirical problem, and is put in the terms and forms of sensibility. This school did not treat nature as a criterion or principle governing experience, but rather as a portion or period of the reality of experience itself. Thus, in respect to ethics and law, it did not seek the supreme law in the absolute being of every man, in his ultra-sensible quality, which is added to and prevails over his physical side, but endeavors to find that law by which man existed or is supposed to have existed in another age. It does not see that, in remote antiquity, prehistoric law did not exist as a truth superior

[5] *Thomasius*, "Fund. Jur. Nat. et Gent.," Lib. I, Cap. I, § 3. He thinks he can avoid the difficulty by this definition, "Quod in corporibus visibile est aut tangi potest, materiam vocamus; invisibilia autem et quæ tangi non possunt, vocamus naturam."

[6] *T. Meyer*, in his recent "Institutiones Juris Naturalis," Pt. I., (Freiburg, 1906) has pointed out this need, "Quo sensu hoc loco illud vocabulum (scil. natura) acceptum velimus, accuratius determinetur necesse est; eo magis, quod naturæ conceptus præ ceteris in tota hac disquisitione instar fundamenti nobis erit, cui deinceps gravissima doctrinæ capita superstruantur" (p. 6). He does not go, however, beyond the usual Thomistic-Aristotelian determinations. Cf., in the same sense, *Cathrein*, "Philosophia Moralis," 6 ed. (Freiburg, 1907), § 12, n. 7, § 69.

to phenomena, but only as a phenomenon chronologically earlier. So the problem is manifestly misplaced and not solved. Only, thanks to the indefinite distance of this hypothetical state, of whose actual existence there is no historical proof, this hypothesis can assume little by little a quality more purely speculative, until it becomes openly a means of expressing a postulate of reason.[7] The traditional contraposition of the two states, the natural and the civil, as two successive empirical realities, the former being a norm for the latter, is based however on a methodological error, the result of a failure of a precise and strict concept of nature. The equivocation of this word, as we have said, covers distinct and badly fused notions.

§ 179. *Natural in the Sense of Primordial.* In the first place, the meaning of primordial is attributed to natural, thus making nature mean the genesis of things.[8] In this way the primitive condition of man is

[7] It is strange that even those who, like Rousseau and Kant, understand the state of nature in this high regulative significance, often refer to it as if it had existed in some definite period. This is due to the still existing strength of philosophical tradition and the stubbornness and inadequacy of language in the expression of purely ideal relations. For example, *Kant* writes in "Met. Anfangsgr. d. Rechtslehre," II Th., § 44: "The state of nature . . . *was* a state of lawlessness, *before* a public legal state was formed. . . . " "One outgrows the state of nature." Cf., however, ibid., § 47 etc. It would serve no purpose to cite Rousseau. For the historical development of this doctrine, cf. *Del Vecchio*, "Su la teoria del contratto sociale" (Bologna, 1906).

[8] So *Aristotle* in his "Met." D, 1814 b, 4: "Φύσις λέγεται ἕνα μὲν τρόπον ἡ τῶν φυομένων γένεσις." Cf. *Thomas Aquinas*, "Sum. Theol.," 3, Qu. 2, Art. 1, "Sciendum est quod nomen naturæ a nascendo est dictum vel sumptum — unde primo est impositum hoc nomen ad significandum generationem viventium, quæ nativitas vel pullulatio dicitur, ut dicatur natura, quasi nascitura," etc. See also ibid., I, Qu. 29, Art. 1.

considered natural or conforming to nature, for the single reason that it is by hypothesis anterior to any other condition. In the same way the earliest law, which we would call the positive law of the most remote age, is called natural.

§ 180. *Logic of the Genetic Criterion.* This concept of nature is fitted to show a reality of experience, an existence in fact. Consequently applied and developed, this criterion would necessarily lead to the consideration of the genetic determination of empirical reality in general or the law of historical production and of the causal relation of facts; in which lies the naturalness of the phenomenal system.[9] Such was Vico's thought, expressed in the famous sentence, "The nature of things is nothing but their birth at definite times and in definite guises; which always are thus and so, consequently thus and so are things born."[10] This shows and "fully develops" the criterion of historical or empirical comprehension, because the connection between fact and the condition by which it is produced is stated as unavoidable and always true. If the nature of things is nothing but their birth, everything is natural, inasmuch as it is born. It is made impossible "a priori" for any fact to be born more or less than natural. This is the conclusion to which a strict adherence to the genetic criterion leads, and this is in substance the thought of Vico. But it is very different with the ancient theories of natural law. Their pseudo-historical concept of nature did not have this meaning; in fact it had no exact meaning at all. They were "mixed modes of thought"[11] which marked the speculation not yet governed by criticism.

[9] Cf. Pt. III, Cap. II, p. 224, ante.

[10] "Scienza nuova" (2), Lib. I, "Degli Elementi," § XIV. Vide, also, § XV.

[11] *Maine*, "Ancient Law," p. 73.

§ 181. *Incoherence of the Jus-Naturalists.* The jus-naturalists hold that nature remained in a primary state.[12] Its empire was limited to the earliest age. Stating this as a premise, they give it in reality, as we will see, another meaning, which is, however, obscured and dominated by the temporal. They speak of the exit of man from the state of nature; they suppose that natural law, after dominating one period, stopped at a given point to make way for another more or less different, that is, more or less opposed to nature. This is clearly an abandonment of a strict genetic criterion, which would have made it correspond to one of the rational and legitimate, that is, philosophical meanings of nature. Where such a criterion is observed, the "civil state" or the "state of society," and the positive law of all the succeeding ages, must be held equally natural as the hypothetical first state and its law.

§ 182. *Spinoza.* There is one jus-naturalistic philosopher who, without reaching this conclusion, approximates it very closely. That is Spinoza. The premises of his system do not allow a strict distinction, much less an antithesis, between the natural state and law on one side and the civil state and law on the other. The quality of empirical naturalness was recognized by Spinoza in social and juridical institutions in general in this, that according to his doctrine "omnia ad naturam referri debent," not exclusive of the facts of man, determined by nature "ad certo modo existendum et operandum."[13]

[12] The incongruity hidden in this doctrine was seen by *Pascal*, "Pensées," Pt. I, Art. VI, § 19, in Didot's ed. of "Moralistes français," "What is this nature, which may be effaced? Custom is a second nature which destroys the first. Why is not custom natural? I greatly fear that this nature itself is but a first custom, as custom is a second nature." Cf. what *Montaigne* had written in his "Essais," Lib. I, Cap. 22; Lib. II, Cap. 12.

[13] Cf., § 152 ad finem, and notes, ante. To the same effect, *Kriegsmann*, in "Die Rechts- und Staatstheorie des B. v. Spinoza," p. x;

While, however, Spinoza, following historical tradition and the example given but a few years before by Hobbes, accepted that distinction, necessitated by the logic of his principles, he little by little so determined it as to lessen the discrepancy between the two terms as much as possible. This tendency he shows particularly in the last of his works, the unfinished "Tractatus Politicus," where the perpetual reality of natural law is so strongly affirmed that its dualism with the "jus civitatis" loses all weight.[14] On the other hand, carrying our examination further, we must observe that a complete elimination of the dualism would have implied a grave consequence for Spinoza's system, although it was the logical result of his premises. It would have shown their insufficiency, it would have entailed the abandonment and absolute negation of all ethical value, and therefore of the obligation and validity of human laws. A "minimum" of

"The contradiction into which Spinoza falls lies in the opposition of the state of nature to the civil state. All which happens, happens by the eternal law of God or nature, "natura naturans." Thus it is nature which produces the civil state by necessity. We can call this state natural with the same right as the other, which Spinoza thinks preceded it." Cf., too, *Stahl*, "Geschichte der Rechtsphilosophie," p. 182 n.: "The distinction between the state of nature and that of the social contract cannot be upheld, since the power of nature is recognized over everywhere."

[14] "Jus naturæ uniuscuiusque (si recte rem perpendamus) in statu civili non cessat. Homo namque tam in statu naturali quam civili ex legibus suæ naturæ agit, suæque utilitati consulit," etc. "Tract. Polit.," Cap. III, § 3; cf. Cap. II, § 15 and passim. Spinoza's statement concerning the difference between his doctrine and that of Hobbes should be remembered here: "Quantum ad Politicam spectat, discrimen inter me et Hobbesium — in hoc consistit, quod ego naturale jus semper sartum tectum conservo, quodque supremo magistratui in qualibet urbe non plus in subditos juris, quam juxta mensuram potestatis, qua subditum superat, competere statuo, quod in statu naturali semper locum habet." *Spinoza*, "Epistula" L, in "Opera," (Jena, 1802), Vol. I, p. 633.

inconsequence was needed to avoid this conclusion (which, however, is alone legitimate) in the mind of him who accepts the physical or mechanical concept of nature as exclusive. Of this vice in the doctrine of Spinoza we will speak later.[15]

§ 183. *Antithesis of the Natural and the Human.* In general, the champions of the natural rely on the common and vague meaning of the word "nature," whereby it denotes what is primitive and original in antithesis to what is derivative and acquired, especially through art or act of man.[16] The applications of this meaning and the antitheses are frequent and various.[17] It is not right to condemn "a priori" such a restrictive and particular use of a term which has, too, a more general meaning, provided that the verbal ambiguity does not result in a confusion of ideas. It may be licit to oppose the natural to the human, but we must never

[15] Cf., § 193, post.

[16] Vide, for example, *Puffendorf*, "De Statu Hominum Naturali," § 2 in "Dissertationes Academicæ Select." (1675), p. 584. "Propositum est nobis contemplari statum hominum, quo extra societatem civilem vivere, et in quo omnia inventa et instituta humana, queis vitæ huic decor et commoditas fuit conciliata, abstracta intelliguntur. Eum naturalis status vocabulo adpellare placet, non solum quia istud a non paucis hoc sensu adhibetur, sed et quia cum usu communis sermonis congruit, naturalia contradistinguere iis, quæ mediante facto humano existere coeperunt." Cf. "De Jure Nat. et Gent.," Lib. II, Cap. II, §§ 1, 2.

[17] Cf. *Ritchie*, "Natural Rights," p. 74. "Within 'Nature,' in this widest sense, which includes all human life and conduct, and all the works of man, we are very commonly accustomed to make the distinction between (1) what man does, and (2) what exists or is thought to exist (for here the difference is not always recognized), independently of, and apart from, what man does. We call the former set of phenomena 'human,' 'social,' or 'artificial,' and the latter alone in antithesis to them 'natural.'" Cf., also, *Lewis*, "Remarks on the Use and Abuse of Some Political Terms," p. 130 et seq.

forget that the fact of man, too, is subject "qua" phenomenon, to the laws of nature.[18] To distinguish the

[18] If we mean by nature exclusively what is foreign to man, we must note, however, that human action interacts or can intervene in phenomena of all kinds. For example, not only the flora and fauna but even the climate of a country is modified by the acts of man; thus, the rainfall is increased or diminished by the planting or destruction of forests. Cf. *Ritchie*, "Natural Rights," p. 68 et seq. This does not prevent the phenomena, in which man is in some way active, from being natural, as in fact human participation and interference are natural. In a truly philosophical sense, as we have seen, nature does not mean a class or kind of fact as much as a manner of considering them (universally). For example, *Kant* says in "Kritik d. prak. Vernunft," p. 52: "Nature in the most universal sense is the existence of things according to laws"; and *Rickert* in "Die Grenzen der naturwisserschaftlichen Begriffsbildung," p. 212: "Nature is reality universally considered." Hence, the antitheses, in which nature figures as a term, objective and concrete, have lost their importance, or have been superseded by others in which it is taken as a criterion. In a word, where a distinction of objects used to be found, a distinction of methods is to-day recognized in its place. Thus, when natural sciences are opposed to historical, two methods of scientific treatment are denoted, which Windelband called respectively the "nomothetical" and the "idiographical." (Vide *Windelband*, "Geschichte und Naturwissenschaft," p. 12). But he says "that this methodic opposition classifies the treatment, not the content of the sciences. It is possible (and has been done) for us to make the same facts the object of a nomothetical and an idiographic study." Vide, also, to the same effect the larger developments by *Rickert* (op. cit., p. 249 et seq., esp. 255 et seq., 289 et seq., and passim). Thus *Croce*, "Filosofia di Hegel," p. 154, holds that "the content of the so-called natural sciences is not a part of reality, but a method of the treatment of the whole of reality." Cf. his "Lineamenti di una Logica come scienza del concetto puro" (Naples, 1905), esp. p. 69 et seq. Notwithstanding these authorities, natural, in common parlance, still designates a certain class of fact to the exclusion of another, and in many cases it is used to denote simplicity or primitiveness, as distinct from complexity or elaboration. But in these cases it is a question of purely empirical differences, whose sense is limited to a certain relation, so that the same object can be considered natural or unnatural, depending upon

primitive from the subsequent is equally licit, but we must never give a distinction so made any but an empirical or temporal meaning. If we convert a temporal "prius" into a logical principle, a datum into a law or type, a co-ordinative relation between objects of experience into one of ideal control or subjection, if, in a word, we exchange the physical concept of nature for the metaphysical or normative, we are guilty of a paralogism, which inaccurate or ambiguous phraseology may be able to hide to some extent but never can cure.[19] Now this is precisely

circumstances. If, for example, human facts are in a certain sense opposed to others which are restrictively called natural, the result is that, by subdividing the first class, the part of human activity which is the more instinctive and spontaneous can be called natural in antithesis to that which seems the result of reflection and culture. So, by this criterion, nations can be divided into "Naturvölker" (naturefolk) and "Kulturvölker" (civilized people), with successive division into "Vollkulturvölker" and "Halbkulturvölker." Cf. *Vierkandt*, "Naturvölker und Kulturvölker" (Leipsic, 1896), where, however, such fundamental concepts are anything but clearly set forth. Vide, esp., p. 7, et seq., p. 110 et seq., p. 239 et seq. We can see at once that such particular qualifications and distinctions in the field of phenomena, although relatively justified, do not embrace the philosophical problem of nature and are not enough to solve it.

[19] Cf., on errors of this kind, the well-weighed statement of *Simmel*, in "Einleitung in die Moralwissenschaft," 1 Bd., p. 94 et seq. "If one looks upon altruism as a less natural force than egoism because it appears later, then one must also look upon sexual instinct as a less natural force than hunger, because the former appears in the second decade of life while the latter makes its appearance with the first day of existence; or the growth of the beard less natural than the growth of the hair of the head." The entire mode of thinking, which places the older and more primitive things in an especially close relation to nature and thereupon ascribes unto them certain qualities, is entirely wrong and erroneous. If we distinguish between nature and any of her antitheses, such as culture or ethics or conformity to law, certainly these conditions are the later ones (as far as time is concerned) but the converse is entirely unjustified, that the

the equivocation into which the ancient and traditional doctrine of the "jus naturæ" almost constantly falls for want of criticism. It fused the two ideas of the primitive and the exemplary into one in its badly defined idea of the natural.[20] What, on one hand, it believed to have existed at the beginning, it predicated, on the other hand, as a law or model for all time. Inversely, by the same "optico-mental" illusion, it did not believe it could advance a norm or principle of what should be, unless it could suppose or represent it as having existed in a remote age. This weak ideology wavered awkwardly between the sensible and the intelligible, between empirical data and rational ideals, incapable of establishing a precise distinction or a purely transcendental relation between them. It was exhausted in the search for a hypothetical coincidence or medial term which would have the characteristics of both. It is no wonder that this term was sought and found by a fiction in the dawn of history, because the indefinite distance of the fact is the sign and almost the symbol of the effort made to obtain its transfiguration into principle, that is, into a truth over and above its actuality.[21]

§ 184. *The Myth of an Ideal Past.* Thus the complex and mighty myth of an ideal past was born, which characterizes the school of the "jus naturæ" and con-

temporal relation is sufficient to attach to the earlier things the characteristic of being more natural and thereupon to ascribe to them favorable or unfavorable aspects which really and logically cannot be found therein."

[20] The characteristic words of *Gratianus* will be remembered: "Naturale jus inter omnia (jura) primatum obtinet *tempore* et *dignitate*." "Decretum," Pt. I, Dist. V.

[21] "What is remote in time and space," writes *Gioberti* in "Della Protologia," Saggio IV, § III (in "Opere inedite," Vol. IV, p. 177), "pleases more than what is near or present, because it partakes more of the intelligible and less of the sensible."

tributed so largely to its discredit as historical studies increased in number and insight. It is a myth, as the student can see, which supplies an inadequate expression for the speculative needs of reason, and so it must be judged. In the formation of beliefs concerning the primitive state of man and the law which governed it, no small part was played by religious dogmas interspersed with classical tradition.[22] For we must note that in these dogmas the tendency to empirical transposition and sensible representation of postulates and principles of a metaphysical order by reference to past ages was effectively developed. The habit of looking upon the past as the seal of truth, properly superior to all time, thereby implying a grave paralogism, has long ruled almost uncontradicted in the philosophy of law, and has influenced not a few of its fundamental doctrines, to its prejudice, rendering its refusal too easy, because its content of truth is lost in improper and fallacious forms. The result of this habit was that the new findings of justice were almost always announced as confirmations or restorations of law formerly upheld but later somehow abrogated;[23] and that by this fiction of an ancient state of perfection, subsequently corrupted and overthrown, history was almost systematically made

[22] Cf., on this point, *Riezler*, "Die literarischen Widersacher der Päpste zur Zeit Ludwig des Baiers" (Leipsic, 1874), p. 131 et seq.; *Gierke*, "J. Althusius und die Entwicklung der naturrechtlichen Staatstheorien," 2 Ausg. (Breslau, 1902), p. 92 et seq., and passim; *A. J. Carlyle*, "A History," Vol. I, esp. Cap. VIII et seq.

[23] Cf. *Jodl*, "Ueber das Wesen des Naturrechts," p. 12 et seq., where, however, the intrinsic significance of this fact is not fully grasped. Vide also *Ritchie*, "Natural Rights," p. 11 et seq.: "The tendency is always strong to translate logical and metaphysical theories into the easier language of imaginated history . . . At all times it has been customary to represent reform as the return to some earlier and better condition of affairs. The very word 'reform' suggests this." Cf. ibid., p. 75 et seq.

the empirical or actual foundation, without which no ethical principle or rational ideal could be sustained. The theory of a social contract in many of its historical developments offers a good example of this dialectic artificiality. And we must remember that the adversaries of this system had no method of confutation, different from that of its followers. So they sought another primitive fact to oppose to that, true or presumed, upon which the contractualistic deduction was founded. Filmer proceeded in a typical way, when, in order to combat the doctrine of the divine right of kings and to show "the natural right of regal power," he had recourse to the primitive family state of Biblical tradition and taught that politic power is paternal, inherited by Noah from Adam.[24] In this pseudo-historical ideology, the legitimacy of a régime depends upon its conformity with another prior in existence, and progress could only be a return, that is, a "regression to the best" or a "return to first principles."[25] And when we

[24] Vide *R. Filmer*, "Patriarcha, or the Natural Power of Kings" (posthumous edit., London, 1680), esp. Cap. I, "That the First Kings were Fathers of Families," §§ 8, 10. Filmer's work was confuted at great length by *Sidney*, "Discourses Concerning Government," (posthumous edit., London, 1698) by *Locke*, in the first of the "Two Treatises of Government," and by others. Cf. *Mohl*, "Geschichte und Literatur der Staatswissenschaften," I Bd. (Erlangen, 1855), p. 327 et seq. *Rousseau*, "Du social contrat," Lib. I, Cap. II, in fine, alludes ironically to this.

[25] *Gioberti*, "Teorica de sovranaturale," 2 ed. (Capolago, 1850), Vol. II, Pt. II, §§ CXX–CXXI, and *Machiavelli* (cited there in n. LII), "Discorsi sopra la prima Deca di T. Livio," Lib. III, Cap. I. For this "tendency to look backward instead of forward for the goal of moral progress," cf. *Maine*, "Ancient Law," Cap. III, IV, esp. p. 71 et seq. His theory of the origin of the contrary tendency is, on the other hand, inaccurate, "The tendency to look not to the past but to the future for types of perfection was brought into the world by Christianity" (p. 74). References to the idea of

consider that the primitive condition is, and in the past has been to a much larger extent, left to conjecture, we can readily see the possibility of widely divergent conclusions in this method. Depending upon the conception of the "state of nature," at any given historical moment its recall could practically be resolved into an attempt to legitimize established authority, or, more frequently, into a critical demolition of it.[26]

§ 185. *Origin and Function of the Erroneous Belief in an Ideal Past.* This criticism, however, is not and is not

progress are not entirely lacking in classical antiquity, but in that period, as during the earlier years of Christianity and throughout the Middle Ages, this idea was overcome by others which were both diverse and contrary. Only in modern times has the tendency to regard history as development and progressive advance towards perfection been generally followed. Vide *Vidari*, "Intorno alla genesi dell' idea di progresso morale sociale" in "Rendiconti" by the Royal Institution of Science and Art of Lombardy, Series II, Vol. XXXVII, 1904, p. 636 et seq.; *Grotenfelt*, "Geschichtliche Wertmassstäbe in der Geschichtsphilosophie bei Historikern und im Volksbewusstsein" (Leipsic, 1905), §§ 2, 3. Cf. *Caro*, "Le progrès social, Histoire de l'idée du progrès jusqu'au dix-neuvième siècle," in volume entitled "Problèmes de morale sociale" (Paris, 1876), esp. p. 298 et seq., *Littré*, "La science au point de vue philosophique," (Paris, 1873), esp. p. 419 et seq.; *Janet*, "Histoire de la science politique," Vol. II, p. 676 et seq. Cf., also, Pt. I, § 21 et seq. and § 33 et seq., ante.

[26] The destructive force of the idea of a natural opposed to a civil state was pointed out by *Pascal* "Pensées," Pt. I, Art. VI, § 9, alias XXV, 6, or III, 8; "The art of overturning States consists in upsetting established customs by going back to their source to show their lack of authority and justice. We must, someone says, return to the fundamental and primitive laws of the State, which unjust custom has destroyed. . . . The people are easily persuaded by these harangues." These statements caused, as Maine believed, by the uprising of the Fronde, are equally applicable to subsequent popular movements, particularly those of the following century. Cf. *Maine*, "Popular Government" (new ed., London, 1890), p. 155, n. 6.

meant to be purely rational, but it tries to remain in the sphere of experience, and when constrained to leave it, it supplies its lack by imagination. In other words, it supposes and adds new experiences as it needs them. It does not dare to oppose "pure ac simpliciter" an "a priori" rational necessity to fact, but only another more or less plausible fact — one which if not true at least has the virtue of verisimilitude, if not proximate, then indefinitely remote. This process, characteristic of the whole order of systems of natural law, is properly to be considered as an intermediate grade of development, which leads the mind from the consideration of phenomena to that of ideas, from the comprehension of a fact to that of the norm which governs it. It is well known that historically these two notions were confused until a certain step was reached. In a primitive epoch, as Vanni, following in the footsteps of Maine, points out, "men could not distinguish between what they do and have always done and what they should do."[27] Authority and power were considered one, and custom seemed valid and just by the fact of its establishment. Then criticism developed as knowledge grew, which could distinguish between reason and power, justice and force, φύσις and νόμος. The theory of natural law is only the expression of this antithesis, which has its roots in consciousness itself.[28] Although glimmers of this antith-

[27] Vide *Vanni*, "Maine," p. 63 et seq.; cf. "Il sist. di Spencer," p. xxvi et seq.; "Lezioni di Filosofia del diritto" (Bologna, 1904), p. 187, 267.

[28] Cf. *Del Vecchio*, "Il sentimento giuridico," p. 21 et seq.; "La Dichiarazione dei diritti dell' uomo e del cittadino nella rivoluzione francese," p. 22 et seq.; Pt. I, § 13, ante. For a general consideration of the theory of natural law in its historical development, see *Filomusi-Guelfi*, "Del concetto del diritto naturale"; *Carle*, "La Filosofia del diritto," Vol. I, Sec. I, p. 235 et seq. Cf. his "La vita del diritto," p. 303 et seq. and passim. Vide, also, *Solari*, "La scuola

esis are seen in antiquity,[29] they were particular and occasional. And its accurate and exact deduction, consonant with a universal conception of the world, presented such great difficulties and implied problems of such a nature as to make solution attainable only by mature philosophical thought, furnished with critical means of transcendental reflection. It is not strange, therefore, that it was solved slowly and only after a number of more or less inadequate and imperfect attempts. The mind does not free itself without an effort from particular immediate impressions and sensible suggestions. The vision of empirical data is not, and cannot be, rationally overcome "ex abrupto." Thus it is, that at first hypothetical or fictitious facts are substituted and the authority of the past is invoked to obtain the first provisional freedom from the authority of the present. The reference to this class of truth which, if not rational, is at least not strictly empirical, offers, so to speak, a resting place for a mind not entirely capable of rising to the pure contemplation of the ideal, independent of fact. Such is the origin and function of those methodological errors touching the concept of

del diritto naturale nelle dottrine etico-giuridiche dei secoli XVII e XVIII" (Turin, 1904).

[29] The invocation of Antigone in Sophocles (v. 449 et seq.) is a celebrated example. It is noted by *Aristotle*, "Rhet.," I, 10–15. Cf. *Hegel*, "Grundlinien der Philosophie des Rechts," § 166; *Ritchie*, "Natural Rights," p. 30 et seq. *Burle*, "Essai historique," p. 279 et seq. Much more noteworthy, because less indefinite, is the thought of the Sophists concerning this antithesis. But still they did not present it in the organic form of a system. For the various tendencies of Sophistic thought, cf. *Chiappelli*, "Sulle teorie sociali dei Sofisti greci"; *Fragapane*, "Il problema delle origini del diritto," p. 15 et seq. and the authors there cited. Cf., too, *Petrone*, "Le nuove forme della scetticismo morale e del materialismo giuridico," p. 128 et seq.

nature, which have been shown to exist in the doctrines of the philosophy of law.[20]

[20] The history of philosophy in general, especially in antiquity, offers many examples of similar paralogism, for the reasons given above. So in ancient Greek naturalism, writes *Fragapane*, in "Il problema delle origini del diritto," p. 21 et seq., "it is always a question of nature posited as one of time; time and duration, for primitive men, when rationalism is not developed, are the signs of authority and tests of truth." For other such errors, cf. *Schelling*, "Philosophische Briefe über Dogmatismus und Kriticismus," p. 321 and note. In general, contra the philosophers who "wish to show the eternal by means of the facts and consideration of time," see *Schopenhauer*, "Memorabilien," p. 720.

# CHAPTER VII

## CONCEPT OF NATURE IN SOME SYSTEMS OF THE PHILOSOPHY OF LAW

PREOCCUPATION OF THE IDEAL IN THE CONSIDERATION OF HISTORICAL FACTS. — REGARD FOR THE PRIMITIVE IN THE STUDY OF HUMAN NATURE. — HOBBES: HIS METHOD IN THE STUDY OF THE NATURAL. — EGOISM AND THE SOCIAL SENSE. — EMPIRICAL MOTIVES AND THE BASIS OF LAW. — NULLITY OF NATURAL LAW ACCORDING TO HOBBES. — ANTITHESIS BETWEEN "JUS NATURALE" AND "LEX NATURALIS." — CRITICAL OBSERVATIONS. — SYSTEM OF SPINOZA. — REDUCTION OF LAW TO PHYSICAL FORCE AND THE INCONSISTENCY OF THE PRINCIPLE OF OBLIGATION. — NEGATIVE SIGNIFICANCE OF THE DOCTRINE OF SUCH WRITERS.

§ 186. *Preoccupation of the Ideal in the Consideration of the Historical.* If our earlier considerations have enabled us to penetrate and justify in part some of the paralogisms which are frequently found in the philosophical doctrines of law, they have not prevented, nor should they prevent us, from recognizing the gravity of their consequences. Their result was, on one hand, an abuse which can be called systematic, of fictions and conjectures, to the detriment of a true and objective historical picture of law. By this a normative meaning was given to the genetic or historical problem. The consideration of facts was, then, disturbed by that of the ideal, which should be seen and understood in the fact itself. This preoccupation first appeared in the choice of historical arguments, a choice dependent upon the

caprice of the chooser, determined less by a desire to have a full grasp of events than by a certain "mental sympathy" for particular periods and methods, suited to corroborate some preconceived practical or political thesis. For this and other cognate reasons, a large part of the historical reality of law was for a long period almost purposely forgotten.[1] But (what is more grave)

[1] The idea of a universal jurisprudence, in the sense of a comparative study of the positive laws of all people, was conceived of by Leibniz as a scientific need, which must be satisfied (vide *Leibniz*, "Nova Methodus Discendæ Docendæque Jurisprudentiæ," Pt. II, § 29: "Ex his aliisque omnibus undique collectiis, Deo dante, conficiemus aliquando *theatrum legale*, et in omnibus materiis omnium gentium, locorum, temporum placita παραλλήλως disponemus"). The same idea was held and emphasized by others, above all by Vico. The first to outline the organic programme of a comparative science of universal law, even with the terminology now current of "Universal-Jurisprudenz" and "vergleichende Rechtswissenschaft" was *P. A. Feuerbach* (to-day entirely forgotten in this respect). V. his posthumous work, "Idee und Nothwendigkeit einer Universaljurisprudenz" (publ. by his son, Ludwig Feuerbach, in "A. von Feuerbach's Biographischer Nachlass," 2 Ausg. (Leipsic, 1853), II Bd., p. 378 et seq.). But only in a later period, approximate to ours, has this idea begun an effective career. Vide, for the directive and fundamental concepts of such science, *Del Vecchio*, "Sull' idea di una scienza del diritto universale comparato," 2nd ed. (Turin, 1909; German transl., "Die Idee einer vergleichenden universalen Rechtswissenschaft," in "Archiv für Rechts und Wirtschaftsphilosophie," VII, 2–3, Berlin, 1914). See, also, *Post*, "Einleitung in eine Naturwissenschaft des Rechts" (Oldenburg, 1872); "Einleitung in das Studium der ethnologischen Jurisprudenz"; "Ueber die Aufgaben einer allgemeinen Rechtswissenschaft" and his other works; cf. *Achelis*, "A. H. Post und die vergleichende Rechtswissenschaft" (Hamburg, 1896); *Bonfante* and *Longo*, Introduction to the Italian translation of Post's work, "Giurisprudenza etnologica" (Milan, 1906); *Bernhöft*, "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft" in "Zeitschrift für vergleichende Rechtswissenschaft," 1 Bd., 1878; *Kohler*, "Das Recht als Kulturerscheinung" (Wurzburg, 1885); "Die Entwicklung im Recht," in "Zeitschrift für das Privat- und öffentliche Recht der Gegenwart," XIV Bd., 1887,

a subjective and imaginative element was introduced also into the treatment of those events and periods which seemed worthy to be stated.[2] In fact history, especially that of archaic times, was thought of as a means, and was sometimes even made a pretext, for defining programs and exhibiting models. And the sinister influence of this error of the confusion in one ambiguous concept of the primitive and the ideal is shown not only in historical but in strictly speculative studies. The compromise of the two diverse needs is accompanied (as is inevitable) by harm to both. Thus, attempting to deduce the most general principle of law from the nature of man, recourse is had to it in its primitive and rudimental forms, and the impulses

pp. 410–18; "Ueber die Methode der Rechtsvergleichung," ibid., XXVIII Bd., 1901, pp. 273–84. *Kohler*, through his many investigations (carried on also by his students, as for example A. Hellwig) has given great value to his maxim; "Thus no period or popular stock is unimportant, nor the worst type of human existence unconsiderable, no historical tradition of a past age so meagre, that we should not consider it." *Kohler*, "Die Entwicklung im Recht," p. 417. Cf., on the work of Kohler in this field, *Berolzheimer*, "J. Kohler als Rechtsphilosoph" in "Philosophische Wochenschrift," I Bd., 1906; vide, also, *Fadda*, "Rendiconto delle tornate e dei lavori dell' Accademia di scienze morali e politiche," A. XLII (Naples, 1904), p. 27 et seq.

[2] *Maine's* bitter and not entirely justified criticism of philosophico-juridical doctrines in general has reference to this error, "There is one remarkable omission with which all these speculations are chargeable, except, perhaps, those of Montesquieu. They take no account of what law has been at epochs remote from the particular period at which they made their appearance. Their originators carefully observed the institutions of their own age and civilization, and those of other ages and civilizations, with which they had some degree of intellectual sympathy, but, when they turned their attention to archaic states of society which exhibited much superficial difference from their own, they uniformly ceased to observe and began guessing." "Ancient law," Cap. V, p. 118, et seq.

which govern him from birth, and the functions and properties which he has in common with the lower animals and even inanimate objects in general,[3] in a word, his empirical side or quality as a phenomenon or "particula totius naturæ,"[4] is considered much more than his true intellectual quality, which alone makes him capable of an ethical (and therefore juridical) existence over and above the physical. In the search for the inclinations and impulses, originally manifested in the phenomenology of human beings, an attempt is made to synthesize them by reducing them to the smallest number, one if possible, with the object of making it the basis of law and ethics. The error, however, does not lie so much in these attempts (inspired by a rather rudimentary psychology) to reduce human nature to the smallest number of particular motives or one motive, such as sociability or egoism, as in the common methodical assumption of deriving moral and juridical obligation from a simple psychological inclination, empirically existing in the first grades of consciousness.

§ 187. *Hobbes; his Method in the Study of Nature.* Hobbes, therefore, was in a certain sense right when he combated the social sense as the basis of law. And yet his criticism in the last analysis put his own doctrine as well as the one he attacked in the wrong, for while attacking its content, he followed its method, wherein lay its error. In fact he followed it more strictly than its originators. The doctrines of Hobbes, like those of Spinoza, deserve special study. They are distinguishable from all others because their greater consistence

[3] For the various grades of human participation in the natural order, we can cite *Thomas Aquinas*, "Sum. Theol.," I, II, Qu. 94, Art. 2; and *Vico*, "De Uno Universi Juris Principio et Fine Uno," § LXXV.

[4] *Spinoza*, "Tract. Theol. Polit.," Cap. XVI.

and conceptual precision clearly show vices which are somewhat lessened or hidden by partial inconsequences and intentional vagueness in other systems. Hence it is that we can give these doctrines a certain value as logical experiments and look upon them as "examples of growth" of the fallacies common to the entire class to which they belong, as Schopenhauer regarded the ethics of Fichte in relation to those of Kant.[5] Hobbes, without any substantial change in the terms of the problem formulated in anterior doctrine,[6] proposed to find out "qualis sit natura humana, quibus rebus ad civitatem compaginandam apta vel inepta sit, et quomodo homines inter se componi debeant, qui coalescere volunt."[7] He, too, as we can see, distinguished between what man is by nature and what he acquires by discipline. With this start, he went to an extreme, refusing to accept as natural what was not clearly shown to be an attribute of man from birth, "ab ipsa nativitate," "statim atque est natus." While, therefore, he considered those appetites natural which lead man, together with every other animals, to sensible good,[8] he does not so consider

[5] Vide *Schopenhauer*, "Ueber die Grundlage der Moral," § 11; "Die Fichte'sche Ethik als Vergrösserungsspiegel der Fehler der Kantischen." In this case, (of Fichte), however, we can say that the "growth" shows the value and not the vice in the original doctrine.

[6] This similarity in original position is noted by *Stahl*, "Geschichte der Rechtsphilosophie" pp. 178–9. Cf. the analysis by *Fragapane*, "Il problema delle origini del diritto," Lib. I, Cap. III, esp. p. 74, 76.

[7] *Hobbes*, "De Cive," Præf., cf. Cap. I, § 1.

[8] "Quamquam enim a natura, hoc est, ab ipsa nativitate, ex eo quod nascuntur animalia (homines) hoc habeant, ut statim omnia quæ sibi placent, cupiant, faciantque quantum possunt ut quæ impendent mala, aut metu fugiant, aut ira repellant," etc. "De Cive," Præf. "Infantes, nisi omnia quæ cupiunt dederis, plorant atque irascuntur, etiam parentes ipsos verberant, habentque a natura ut ita faciant." Ibid.

reason [9] nor civil society, that supposes a rational bond which cannot be understood by all, in no case by a child, who, however, is gifted with human nature.[10] What, therefore, gives according to Hobbes (here directly opposed to Aristotle) the most faithful portrayal of human nature is the least developed state of man, with the fewest relations.[11] When he desires to show human nature, he refers to savages [12] and even to

[9] "Homines . . . disciplinam et usum rationis a natura non habent," "De Cive," Præf. "It appears that reason is not, as sense and memory, born with us; nor gotten by experience only, as prudence is; but attained by industry," etc. "Leviathan," Pt. I, Cap. V. "Children are not endued with reason at all, till they have attained the use of speech; but are called reasonable creatures, for the possibility apparent of having the use of reason in time to come." Ibid. Cf., however, "De Cive," Cap. I, § 1, Cap. II, § 1, in fine.

[10] "Manifestum est omnes homines (cum sint nati infantes) ad societatem ineptos natos esse; permultos etiam (fortasse plurimos) vel morbo animi, vel defectu disciplinæ, per omnem vitam ineptos manere. Habent tamen illi tam infantes quam adulti naturam humanam. Ad societatem ergo homo aptus non natura, sed disciplina factus est." "De Cive," Cap. I, § 2, Ann.

[11] *Aristotle*, we have seen, always taught on the contrary, "Naturam ex *fine* seu ex *perfectione* existimandam esse." Cumberland came back to this doctrine in his confutation of Hobbes, observing in respect to the passage which we have just cited: "Certe puerilis est illatio et Grammaticam sapit non Philosophiam moralem, homines nati sunt infantes, ergo ad societatem inepti nati. . . . Quamquam enim vox illa "Natura" a nascendo ducatur, notum tamen est, naturam (humanam dico) eam exprimere rationis vim, cuius inchoata tantum semina in recens natis reperiuntur. Sic ad speciei suæ propagationem natura sua comparatus est homo, et tamen nec infans ad hoc sufficit, nec si morbo sterilis evadat," etc. *Cumberland*, "De Legibus Naturæ," Cap. II, § 2. Cf. ante, esp. n. 19, p. 287, ante.

[12] Vide, for example, "Leviathan," Pt. I., Cap. XIII, where emphasis is laid upon the American Indians; such a tendency is frequently followed. Cf. *Mondolfo*, "Saggi per la storia della morale utilitaria," I, "La morale di T. Hobbes," (Verona, 1903), p. 101 et seq.

children. He follows the old adage, "indicant pueri, in quibus ut in speculis natura cernitur."[13] And yet, even when he ascends in his empirical search to the primordial age, endeavoring to collect rudimentary and unformed manifestations of the human being, they still appear as somehow interfused in a certain order of social relations and subjected to some discipline and adaptation. The study of natural man, although undertaken entirely with empirical intentions and criteria, must, it seems, go beyond immediate experience and end in an abstraction, which in this case, because of the methodological preconception, is based on data gathered from the lowest grades of experience only. Hobbes, in fact, finding man nowhere entirely abandoned to himself, without education or restraint, tried to obtain an idea of him by mentally dissolving civil society.[14] In order to picture the state of nature in its purity, he had to imagine

[13] *Cicero*, "De Finibus Bonorum et Malorum," Lib. V, Cap. XXII, § 61; cf. Cap. XX, § 55, and further, Lib. II, Cap. X, § 32, and the doctrine of Epicurus there given. Others, however, (for example, Grotius, to give an immediate predecessor of Hobbes) have trusted to their psychological study of children to confirm an opposite thesis of human nature. "Idem de infantibus dicendum, in quibus ante omnem disciplinam ostendit se ad bene aliis faciendum propensio quædam . . . sicut et in ea ætate misericordia sponte prorumpit." "De Jure Belli ac Pacis," Proleg., § 7.

[14] "Sicut enim in horologio automato aliave machina paulo implicatiore, quod sit cuiusque partis rotæque officium, nisi dissolvatur, partiumque materia, figura, motus seorsim inspiciatur, sciri non potest, ita in jure civitatis, civiumque officiis investigandis opus est, non quidem ut dissolvatur civitas, sed tamen ut tamquam dissoluta consideretur." "De Cive," Præf. *Puffendorf* had to define the task in the same way, in the dissertation we have cited, "De Statu Hominum Naturali," § 1, where the influence of Hobbes is clear. "Omnes societates velut transscendere, et mente concipere conditionem atque statum hominum, qualis ille extra societatem, et ab omnibus artibus et institutis humanis vacuus intelligi potest." Cf. also, "De Jure Nat. et Gent.," L. II, Cap. II, §§ 1, 2.

men "tamquam si essent jamjam subito e terra (fungorum more) exorti et adulti, sine omni unius ad alterum obligatione";[15] for human nature in his mind is finished or is modified accidentally when human society or history begins.[16] Thus he reduced the nature of man to simple egoistic impulses, such as the instinct of self-preservation, the desire of possession, the fear of death, artifically isolated, and considered all which renders social life possible as transformations or derivations of these impulses. It was his belief that man by nature loves nothing but himself,[17] and that there is nothing in his nature which attempts to correct or overcome this egoism.[18]

[15] "De Cive," Cap. VIII, § 1.

[16] Cf. "De Cive," Cap. I, § 2, "Causas enim, quibus homines congregantur, et societate mutua gaudent, penitius inspectantibus, facile constabit, non ideo id fieri, quod aliter fieri natura non possit, sed ex accidente."

[17] "Si homo hominem amaret naturaliter, id est, ut hominem, nulla ratio reddi posset, quare unusquisque unumquemque non æque amaret, ut æque hominem," etc. "De Cive," Cap. I, § 2. Love would not only be lacking among men "in statu naturæ," according to Hobbes, but there would be a positive will to harm, a "mutua lædendi voluntas." Ibid., Cap. I, §§ 3–6.

[18] The word "egoism" is here used, as usual, in its stricter sense, as the affirmance of the particular or empirical individuality in contradistinction to the consciousness of the quality of universal subject, which constitutes the ethical or non-egoistic character of action. In a broader sense every act can be said to be egoistical, in as much as it aims at any satisfaction of the ego, but in such a case the nature of this satisfaction would have to be determined by the above distinction, which is of capital importance in ethics. Cf. Pt. III, Cap. IV and V, p. 258, ante. *Lasson*, in "Philosophische Vorträge," published by the "Philosfische Gesellschaft" (Berlin), N. F., 1 Heft, "Ueber das realistische Princip der Autorität als der Grundlage des Rechts und der Moral" (Halle, 1882), p. 51, expresses this with accuracy, "In fact it is wholly impossible that anything be willed without the subject seeking his own satisfaction therein; as far

§ 188. *Egoism and the Social Sense.* The most frequent criticism of Hobbe's doctrine is based, as is well known, upon the incompleteness of his psychological analysis, and more particularly upon his defective appreciation of the entire order of motives, which lend even primordial human life (as well as that of the lower animals to a certain extent) a quality which can be called metegoistic. In fact Hobbes, because of his restricted and one-sided psychology, did not adequately set forth the phenomenology of law. In this respect his doctrine, founded on the concept that man is not by nature a πολιτικὸν ζῷον, was inferior to that of Grotius, who followed the Aristotelian maxim,[19] and who, after all, cannot be compared with the thinker of Malmesbury for acumen and originality of viewpoint. Hobbes's attempt to explain the transformation of egoism into sentiments of reverence and piety merits some attention, especially because it marks the beginning of that rich series of research, since continued without interruption in English psychology, aimed to show the origin

as the worth and moral quality of will is concerned, it does not give rise to the question as to whether a man is acting for his own satisfaction or not, but to a question of the kind of satisfaction, for a case in which no selfsatisfaction is sought by the act of will is entirely inconceivable." Cf. similar statements of *Sigwart*, "Vorfragen der Ethik," 2 ed. (Tübingen, 1907), p. 8 et seq.

[19] Vide *Grotius*, "De Jure Belli ac Pacis," Proleg. The Aristotelian doctrine had many followers even in the Middle Ages (cf., for its various phases during that period, *Gierke*, "J. Althusius und die Entwicklung der naturrechtlichen Staatstheorien," p. 94 et seq., 109 et seq.). Especially noteworthy is the statement of *Egidio Colonna*, "De Regimine Principum," Lib. III, C. II, 32, "Sciendum est quod civitas sit aliquo modo quid naturale, eo quod naturalem habemus impetum ad civitatem constituendam: non tamen efficitur nec perficitur civitas nisi ex opera et industria hominum." On this, cf. *Franck*, "Réformateurs et publicistes de l'Europe," Vol. I (Paris, 1864), p. 71 et seq.

and development of moral sentiments.[20] Hobbes, however, was able to give but a rough sketch of what later became the psychology of association, the course of whose advance and refinement resulted in the rectification, and to a large extent in the abandonment, of the early and crude concept of egoism which Hobbes instituted as the basis of his system. He lacked, above all, an exact notion of the organic ties between the individual and the species, which form the quasi-physiological substratum of altruism, and prevent modern science from accepting the hypothesis of an individual controlled entirely by antagonism for his fellows, that is, the hypothesis of an "homo homini lupus."[21] To define human nature in such a way as to repudiate as non-natural sentiments and inclinations which correspond to the very conditions of life, means to suppose a dissension or hiatus at will, where in fact there is and can be only a definite development. It means to give a creative virtue to history, while ignoring some elements

[20] This was pointed out by *Tarantino*, "Saggio sulle idee morali e politiche di T. Hobbes" (Naples, 1905), p. 70, 136 et seq. and passim. Cf. *Laviosa*, "La Filosofia scientifica del diritto in Inghilterra," Pt. I (Turin, 1897), esp. p. 160 et seq., 270 et seq. The relation, pointed out by *Windelband*, "Die Geschichte der neueren Philosophie," 4 ed. (Leipsic, 1907), I Bd., p. 158, between the "selfish system" of Hobbes and the later doctrines of the English economists and naturalists, is less strict. Cf. also, *Jodl*, "Geschichte der Ethik," I Bd., p. 227 et seq.

[21] On the naturalness of man's social instincts, it is enough to recall the proof of Darwin, "The Descent of Man," Pt. I, Cap. III, upon which all the more recent proofs are based. Furthermore, even in Hobbes' day, the necessity, both biological and psychological, of sociability began to be shown by various theories, in opposition to his doctrines. For example, *Cumberland*, "De Legibus Naturæ" (1672), Cap. II, *Shaftesbury*, "Characteristics of Men, Manners," etc., (ed. 1732, Vol. II, p. 17 et seq.). Cf. *Gizycki*, "Die Philosophie Shaftesbury's" (Leipsic, 1876), p. 65 et seq.

without which it could not even begin its course.[22] We must not believe, however, that Hobbes erred entirely or

[22] The Viconian doctrines are still authoritative on the "true elements of history." His well-known fundamental thought is that the principles of the civil world "should be found within the nature of the human mind." *Vico*, "Scienza nuova" (1st), Lib. I, Cap. XI. "Human customs grow out of the nature of man; from customs come governments, from governments, laws." Ibid., Lib. II, Cap. LVI. The system of Hobbes is confuted particularly by Vico by the concept that utility, as similar principles, such as fear, indigence, etc., is not the cause but the occasion of human society. "Homo natura factus ad societatem veri rationisque colendam; igitur factus ad communicandas utilitates ex vero et ratione . . . Non igitur utilitas fuit mater juris et societatis humanæ, sed occasio fuit, per quam homines natura sociales, et originis vitio divisi, infirmi et indigi ad colendam societatem sive adeo ad celebrandam suam socialem naturam raperentur." "De Uno Universi Juris Principio et Fine Uno," §§ 45, 46. The truth of this Viconian doctrine has recently been confirmed by *Carle*, "La Filosofia del diritto," esp. p. 103 et seq. There have been some writers, however, who, erring as Hobbes did, have attempted to reiterate the absolute opposition between human nature and history, between natural man and the social or moral man. "Not nature," writes *Ihering* in "Der Zweck im Recht," II Bd., pp. 85–93, "but history is the author of morals. The human will, as it is given out by the hands of nature and comes forth new each day, has simply the maintenance and affirmance of the ego with a purpose (self-assertion); it is the pure egoism with which nature has endued man. It is always history, which is the source of morals." Yet "natural" man, exclusively egoistic, about whom Ihering writes, is a mere "ens imaginationis," whose existence is not shown by its inventor, as that of the "homo homini lupus" was not shown by Hobbes. On the other hand, the impossibility of its existence has been proved not only by historical and psychological observations but by arguments gathered in the biological field. Experience again denies what the empiricists affirm in its name. To quote *Lasson*, "K. Fischers Hegel," publ. in "Nationalische Zeitschrift," 1901, N. 115: "Those who claim to be pure empiricists go beyond this point in their concept, constructing in excess of what their premise justifies. Unfortunately they do this in undialectic fashion." We need only note, then, that the same hypothesis, in the terms shown by Ihering, is absurd, viz., that morality can arise in

principally through failure to recognize the naturalness of the social sense of man. Even if he had admitted this motive in addition to others (as, in fact, he seems inclined to do in some places)[23] he would not have succeeded in establishing the true basis of law. It even seems to us a peculiar merit in Hobbes that he saw the insufficiency of this principle for juridical philosophy and for politics in particular. The "appetitus societatis" is not "per se" more than an impulse or tendency. It does not form an enforceable obligation nor determine the obedience due the State.[24] It is not enough to state generally the

him who by nature has no capacity to acquire it, "nicht die mindeste Empfänglichkeit" (loc. cit.). Hence we can state with *Simmel*, "Einleitung in die Moralwissenschaft," I Bd., p. 92: "In general, therefore, we can conceive of circumstances in which man as such can live and develop as an egoism, but there must be a certain element of altruism present, in as much as intellectually the concept of self can arise only through separation from and in contradistinction to the non-self."

[23] Vide, especially, "De Cive," Cap. I, § 2, Ann., "Verum quidem esse homini per naturam, sive quatenus est homo, id est, statim atque est natus, solitudinem perpetuam molestam esse. Nam infantes ad vivendum, adulti ad bene vivendum aliorum ope indigent. Itaque homines alterum alterius congressum natura cogente appetere non nego." It is very difficult to reconcile this with other expressions no less explicit, for example with that cited in n. 44, p. 315, post.

[24] This is in substance the meaning of Hobbes' statement, "Societates civiles non sunt meri *congressus*, sed *fœdera*, quibus faciendis fides et pacta necessaria sunt." "De Cive," (Cap. I, § 2, Ann.). We may recall that Aristotle distinguished the instinctive tendency, ὁρμή, to live together, which has its principle in the φιλία, and can be found in many particular and imperfect forms, from its universal and full determination, which forms the State. Vide, esp., *Aristotle*, "Nic. Eth.," Lib. VIII, Cap. IX-XIV; "Polit.," Lib. III, Cap. V, § 10 et seq. Cf. *Hildenbrand*, "Geschichte und System," I Bd., p. 332 et seq., 393 et seq.; *Filomusi-Guelfi*, "La dottrina dello Stato," §§ 37, 41. Even Grotius seems to have had a dawning knowledge that the social nature of man was not a sufficient principle "per se" for the specific deduction of law. "Inter hæc, quæ homini sunt

necessity of social life in order to trace the principle which defines and controls it. The juridical problem is not *if* but *how* men should live in society, that is, according to what criteria of reciprocal obligation society should be formed.

§ 189. *Empirical Motives and the Basis of Law.* It is plain, therefore, that until we consider man in his sensible inclinations, that is, as determined by certain impulses, among them even that of sociability, we will not be able to establish such criteria,[25] as in general we cannot form a norm or an appreciation of their moral or juridical legitimacy or illegitimacy from the simple psychological genesis of acts.[26] To this end, as we have seen, man must be considered in his intelligible quality of pure principle, that is, not as the supporter, but as the author of his motives, capable, therefore, of subjecting all his impulses to measure and judgment, and absolutely determining his own acts. Without this we could not speak of obligation, and all ethical values would fail, if we could not refer, in matters of human action, to this higher point of view, to this metaphysical consideration which controls but does not contradict the

propria, est appetitus societatis, id est, communitatis, ***non qualiscumque***, sed tranquillæ, et pro sui intellectus modo ordinatæ," etc. *Grotius*, "De Jure Belli ac Pacis," Proleg., § 6; cf. Lib. I, Cap. I, §§ 10, 12. Yet Grotius did not follow up this statement, nor correct the indefiniteness of the principle he adopted, so that he could bend his political doctrines to the empiricism, as we have shown elsewhere. *Del Vecchio*, "Su la teoria del contratto sociale," Cap. III.

[25] The impossibility of deducing law or obligation from any impulse or appetite was noted by *Ulrici*, "Das Naturrecht," "Gott und der Mensch," II (Leipsic, 1873), p. 216 et seq.

[26] In an analogous matter this is shown by *Zeller*, "Ueber Begriff und Begründung der sittlichen Gesetze," p. 208, "The question is not what men actually want and strive for, but what they should strive for, on a rule of judgment of their actual behaviour."

empirical order, in which every act seems determined by a sufficient motive.[27]

§ 190. *Nullity of Hobbesian Natural Law.* All systems, indeed, which, founded on this lower concept of human nature, attempt to deduce the principle of morality and law exclusively from its sensible determinations, are doomed to fail.[28] The doctrines of Hobbes do not escape this logical necessity. They, in fact, confirm it. It did not satisfy Hobbes to prove the insufficiency of the motive of sociability as the basis of law; he then ran into an error similar to that which he destroyed, by simply replacing one motive by another—individual selfishness, which seemed more natural or anterior in time. From this he inferred that "natural law" permitted the individual to do whatever he wished

[27] Cf. ante, esp. § 169.

[28] Vide, contra attempts of this kind, the critique by *Stammler*, "Wirtschaft und Recht," esp. p. 178 et seq., who errs, yet, in our opinion, when agreeing expressly with the "chief antagonists of natural law," he denies that an ideal of definite content can be deduced from human nature, however considered, at the same time admitting a universally valid criterion of justice. Vide also his "Die Lehre von dem richtigen Rechte," pp. 93–121; "Wesen des Rechtes und der Rechtswissenschaft," in "Die Kultur der Gegenwart," Vol. II, VIII Abt. (Berlin, 1906), pp. I-lx. Cf., on the ideas of Stammler, what had been written earlier by *Petrone*, "La fase recentissima della Filosofia del diritto in Germania," pp. 241–46, containing a reference to a prior work; also *L. v. Savigny*, "Das Naturrechtsproblem und die Methode seiner Lösung" in "Jahrbuch für Gesetzgeb. Verwalt.," etc., XXV Jahrg., II Heft (1901), esp. p. 35 et seq.; *J. Stern*, "Rechtsphilosophie und Rechtswissenschaft" (Berlin, 1904), p. 12 et seq.; *Berolzheimer*, "System der Rechts- und Wirtschaftsphilosophie," II Bd. (Münich, 1905), p. 415 et seq., and the writers there cited in n. 25; *Makarewicz*, "Das richtige Recht" in "Zeitschrift für die ges. Strafrechtswissenschaft," XXVI Bd. (1905–6), esp. p. 935 et seq.; *Reichel*, in "Zeitschrift für Philosophie und philosophische Kritik," Bd. 124 (1904), p. 232–35, and in "Philosophische Wochenschrift," V Bd. (1907), p. 183 et seq.

and could,[29] but it is clear that the power here expressed is juridical only in name. "Jus in omnia," "libertas belluina,"[30] which nature has given to all is only a paraphrase to denote the absence of all juridical criterion or regulation, or the total anarchy which, in the concept of Hobbes, would be proper and characteristic of the "status mere naturalis." In fact he explicitly denied that there was any distinction in such a state between the just and the unjust. His thought is that no ethical determination, no duty towards others, and, therefore, no right follows from the nature of man. His specious affirmance of natural law is in fact a denial;[31] and this denial is a consequence of his concept of nature.

[29] "Natura dedit unicuique jus in omnia. Hoc est, in statu mere naturali . . . unicuique licebat facere quæcumque et in quoscumque libebat, et possidere, uti frui omnibus quæ volebat et poterat." "De Cive," Cap. I, § 10. Cf. "Leviathan," Pt. I, Ch. XIV.

[30] Thus "De Cive," Ch. VII, § 18.

[31] If we make the licit the same as individual capacity and destroy the logical difference between law and force, law disappears. Cf. Pt. II, Cap. II, p. 147, ante. The method by which Hobbes represented the "status mere naturalis," in which law is the same as caprice, is an illustration of this. There is only the verbal incongruity of calling law that which is, by definition, juridically indeterminate. But it appears from many of his statements, as well as from the spirit of his system, that Hobbes really meant to deny the existence of a natural law. The most noteworthy of these statements is found in the Preface of "De Cive," "Doctrinas de justo et injusto, bono et malo, præter leges in unaquaque civitate constitutas authenticas esse nullas." Cf., also, ibid., Cap. I, § 10, "Injustitia erga homines supponit leges humanas, quales in statu naturali nullæ sunt"; ibid., § 11, "Effectus ejus juris (in omnia) idem pene est, ac si nullum omnino jus exstiterit." See also "Leviathan," Cap. XIII, in fine. The doctrine of Hobbes can, therefore, be likened to that enunciated by Archelaus even before the days of the Sophists, "Τὸ δικαίον εἶναι καὶ τὸ αἰσχρὸν οὐ φύσει, ἀλλὰ νόμῳ." (See *Diogenes La"rt.*, II, 16.) For the interpretation of this passage, which gives place to discussions, vide *Hildenbrand*, "Geschichte und System," p. 47 et seq., where there is a confutation of *Ritter*, "Geschichte der Philosophie,"

§ 191. *Antithesis between "Jus Naturale" and "Lex Naturalis."* In order to find law, Hobbes had to imagine a departure from the natural state, a cessation of that pseudo law, which, he held, belonged to man "quatenus est homo." His doctrine presents this anomalous characteristic, that nature forces man to abandon what nature itself had given him.[32] The primitive "jus naturale" is practically abolished by a supervening "lex naturalis."[33] And only at this point does an effective juridical system begin among men. Here the questions arise: "What is the foundation of this law and in what does its naturalness consist?" Hobbes is here betrayed by his own logic, since he still maintains his concept of human nature from which, as we have seen, he could get no principle of obligation. Even the "lex naturalis" is founded in his system on individual selfishness, of which it is considered a direct and logical consequence. This same egoistic tendency, which at first would confer a "jus in omnia" on all men, later induces them to

1 Bd., p. 344; cf. *Zeller*, "Die Philosophie der Griechen," 1 Th., p. 849 et seq.; *Bertini*, "La Filosofia greca prima di Socrate" (Turin, 1869), p. 311; *Filomusi-Guelfi*, "La dottrina dello Stato," § 8; "Del concetto del diritto naturale," p. 7; *Fragapane*, "Il problema delle origini del diritto," p. 25. — We may recall that even *Franck*, "Réformateurs et publicistes de l'Europe," Vol. II, p. 367 et seq., puts Hobbes among the "adversaires du droit naturel."

[32] See "De Cive," Cap. I, § 15, Cap. II, § 3, "Facit itaque contra rationes pacis, hoc est, contra *legem naturæ*, si quis de jure suo *in omnia* non decedat, etc." Vide, also, "Leviathan," Cap. XIII, in fine. Cf. *Filomusi-Guelfi*, "Del concetto del diritto naturale," p. 20.

[33] The error of considering rights (jus) as anterior to and independent of law (lex, diritto obiettivo), when the two concepts must be co-ordinate and correlative, is especially apparent in the "Leviathan," Pt. I, Cap. XIV. It is derived in the last analysis from the fact that Hobbes thought the "jus naturale" a physical power without any corresponding obligation on the other hand, and, therefore, without the true qualities of right.

part with it by offering them the advantages of social life and legal protection. A calculation based on individual interest would thus form the basis of the authority of the State and be the reason of the obligatory force of law.[34] But it is not difficult to see the inconsistency of such argument. The imperative or obligatory character of the "lex naturalis," with all its implications, is here only apparent.[35] Such precepts as "pacem esse quærendam, jus omnium in omnia retinendum non esse," do not express a duty or a necessity controlling individual caprice, but only a probable effort, and are of weight only as long as the individual is pleased to follow them. The abandonment of the "status naturæ" is determined in such hypotheses only by the impelling desire to escape the dangers and troubles of that state.[36] The confines of particular or empirical individuality are not broken by such an act, nor does man assert himself in a knowledge of his universal character with the consequent obligation of respecting this characteristic in himself and others. If it were so, the narration of the succession of the two states could be taken as an allegorical representation of the basis of

[34] Hobbes made the ancient formula his, "Est igitur lex naturalis . . . dictamen rectæ rationis." "De Cive," Cap. II, § 1, but he gives these words, as he says, a meaning very different from the traditional. (Cf., for example, the passage from Cicero, cited in n. 8, p. 299, ante, and *Grotius*, "De Jure Belli ac Pacis," Lib. I, Cap. I, § 10.) In his mind, the "recta ratio" is only the subjective fitness to measure the consequences of one's own acts in order to attain selfish ends, "ad propriam conservationem" (see annotation of above citation).

[35] This radical defect of the Hobbesian system was especially pointed out by *Jouffroy*, "Cours de droit naturel," 4th ed. (Paris, 1866), Vol. I, Lesson XII, esp. p. 308. Vide also *Tarantino*, "Saggio sulle idee morali e politiche di T. Hobbes," p. 92 et seq.

[36] "Homines omnes ex eo statu misero et odioso, necessitate naturæ suæ, simulatque miseriam illam intellexerint, exire velle." "De Cive," Præf.

law. But, as it is understood and represented by Hobbes, as a mere incident in the continuous struggle of egoism, the passage from the natural to the civil state is a pure and simple fact which would form no obligation, nor would it modify the nature of its authors. Before and after such an event man would be urged on by his sensible impulses, "necessitate quadam naturæ non minore quam qua fertur lapis deorsum,"[87] and bound by his particular egoism. Any law coincident with this would be superfluous, one in opposition, impossible and null. The "status naturæ," therefore, "nomine mutato," would continue; and relations of fact could arise among men, but no relation of law. The State thus formed would govern by caprice and force. The anarchy of the "status naturæ" would be succeeded by despotism and political absolutism. The two concepts are proximate in theory, as in fact the step from one phenomenon to the other is short.

§ 192. *Criticism of Hobbes.* The thought of Hobbes is active within these bounds. The defects implied by his premises are shown in his conclusions, that is to say, the destruction of the intrinsic authority of law and the systematic reduction of law to physical power or fact. Unbridled violence and arbitrary control are mechanical means which express subjuridical reality. Both, in a word, remain below the law notwithstanding their apparent opposition. The meaning of the Hobbesian system, in respect to the problem of justice is, therefore, essentially negative. But such a negation is important, for it confirms "a contrario" the positive proof, otherwise obtained, that the foundation of law can be only gotten by a transcendental conception of human nature—by a conception which goes beyond the phenomenology and

[87] "De Cive," Cap. I, § 7.

empirical determination of action and finds its principle and norm in the intelligible essence of man.

§ 193. *The System of Spinoza.* The system of Spinoza, of which we have already given the fundamental characteristics,[38] gives credence to analogous considerations in regard to law. In this system, too, the identification of the "jus naturale" with physical power or necessity is equivalent to a pure and simple negation of such a law.[39] The total elision of juridical values, the absence of every criterion and rule of conduct, is the result of the reduction of man to the universally mechanical concept of nature. Thus weighed as a part of nature in general, man is always passive. Hence, it is equally natural for man to live according to reason as according to the movement of his passion;[40] and every act, no matter how violent or deceitful, is legitimate, because it is always determined by nature. Developing these concepts, Spinoza concludes that

[38] Cf. § 182, ante.

[39] Spinoza himself points this out when he states that "sub solo naturæ imperio" there is no possibility of a distinction between right and wrong, "injuria non potest concipi." Vide, esp., "Tract. Theol. Polit.," Cap. XVI, and the citations in n. 22, p. 305, ante. An old historian of the philosophy of law was right, therefore, in saying, "To establish a natural law, as Spinoza has done, is in the last analysis nothing but to deny its existence." *Hubner*, "Essai sur l'histoire du droit naturel," (London, 1757–8), Pt. II, p. 430. Cf., also, *Franck*, "Réformateurs et publicistes de l'Europe," Vol. II, p. 410 et seq.

[40] In this respect the doctrine of Spinoza is more exact and more comprehensive than the Hobbesian, which we have just given. Vide *Spinoza*, esp. "Tract. Theol. Polit.," Cap. XVI; "Nec hic ullam agnoscimus differentiam inter homines et reliqua naturæ individua, neque inter homines ratione præditos et inter alios, qui veram rationem ignorant, neque inter fatuos, delirantes et sanos." "Non enim omnes naturaliter determinati sunt ad operandum secundum regulas et leges rationis," etc.

nothing is forbidden by nature, except what no one desires or can do.[41] After this, it would seem that law in a strict sense could not be spoken of. Every act must be thought normal to itself, that is, absolutely justified by its happening, every reference to the deontological order must be excluded. And yet, with the same inconsequence with which he speaks of a model of perfection or "exemplar humanæ naturæ" [42] in ethics, he tries to establish a principle of juridical valuation by supposing a cessation of the "status naturalis" through an agreement among men to act "ex solo rationis dictamine."[43] But at this point we meet the same difficulty as in the Hobbesian doctrine; what is the value of such an agreement? How can it be obligatory if men always act as impelled by nature, each following his own particular interest? Spinoza saw this difficulty and thought to overcome it by subjecting the value of the hypothetical agreement to the advantage gained by everyone who kept it, explicitly admitting, therefore, the right on the part of anyone to break it when it would be to his

[41] "Jus et Institutum naturæ, sub quo omnes nascuntur et maxima ex parte vivunt, nihil nisi quod nemo cupit et quod nemo potest, prohibere; non contentiones, non odia, non iram, non dolos, nec absolute aliquid quod appetitus suadet aversari." *Spinoza*, "Tract. Theol. Polit.," Cap. XVI.

[42] "Ethica," Pt. IV, Præf. The contradiction of such a concept with its premise was shown by *H. Sigwart*, "Der Spinozismus historisch und philosophisch erläutert" (Tübingen, 1839), p. 161 et seq.; "Vergleichung der Rechts- und Staats-Theorieen des B. Spinoza und des T. Hobbes" (Tübingen, 1842), p. 7. The inconsequence is partially cured by the merely relative value given by Spinoza to his criterion. Cf. *Trojano*, "Ethica, Quæstioni preliminari," I (Naples, 1897), p. 49 et seq. Vide, also, *Green*, "Lectures on the Principles of Political Obligations," B., esp. p. 59; *Caird*, "Spinoza" (Edinburgh, 1902), p. 222 et seq.

[43] "Tract. Theol. Polit.," Cap. XVI.

advantage.[44] This reserve saves, in a certain sense, the logic of his system, but it manifestly destroys all the supposed pact, making it both ridiculous and null. "To agree to do a thing," writes Jouffroy most happily, "reserving the right to omit it, if one so thinks best, is not to make a contract, but to crack a joke; and, if no other contract is possible among men save of this kind, the word has no meaning."[45] The juridical edifice falls with the objective validity of contract, upon which it is based, and law again becomes a relation of mere fact, arbitrary regulation sketched by "potentia" alone.[46] The conclusion, based on these examples, is that the true essence of law — that is, its ideal superiority over fact — cannot be deduced from nature until we understand by nature, simple genesis, the beginning in the phenomenal system, or even the genetic relation in general, according to the principle of sufficient reason. The production of fact, with all its relations and conditions of a physical kind, even if effected by the dynamics of motive, cannot furnish an ethical norm. To speak of natural law in this sense, as Hobbes and Spinoza did, means the sacrifice of the juridical criterion to a

[44] "Pactum nullam vim habere posse, nisi ratione utilitatis, qua sublata pactum simul tollitur, et irritum manet." "Nemo contrahit nec pactis stare tenetur, nisispe alicuius boni, vel sollicitudine alicuius mali: quod fundamentum si tollatur pactum ex sese tollitur." "Tract. Theol. Polit.," Cap. XVI.

[45] *Jouffroy*, "Cours de droit naturel," Vol. I, Leç. XII.

[46] As Spinoza thinks that individual right equals individual power in the state of nature, so he believes that in the civil state the "jus civitatis" corresponds to the "potentia civitatis." This doctrine then leads, in accordance with its premise, directly to ethically indeterminate absolutism, vide "Tract. Theol. Polit.," Cap. XVI; "Tract. Polit.," Cap. III, § 5. It is characteristic, for example, that Spinoza defines freedom of thought only in the sense that it is materially impossible for the sovereign power to control it. Vide "Tract. Theol. Polit.," Cap. XVII, XX. For this error, see §§ 94–95, ante.

unilateral concept of nature.[47] These writers, however, having given with their doctrines a clear demonstration of this negative result, indirectly forced their successors to revise their concept of nature as a basis for law. But the uncertainties on this point have not yet ceased. The different senses in which nature can be understood were alternated and used promiscuously by those authors and by the successive jus-naturalistic theorists[48] down to the age of criticism.

[47] There is a new indirect proof of this in the fact that others, for example Harms, admitting but the mechanical sense of nature, and attempting to grasp, without lessening it, the principle of law, comes to state "sic et simpliciter," that it is not a "natural truth," and "does not appertain to nature." *Harms*, "Begriff, Formen und Grundlegung der Rechtsphilosophie" (Leipsic, 1889), p. 85–92. A deeper analysis would have led to admitting, besides that, another concept of nature.

[48] As characteristic examples of this confusion and indefiniteness concerning the fundamental concepts of "natura," "lex naturalis," etc., can be recalled the treatises, praiseworthy under other aspects, of *Cumberland*, "De Legibus Naturæ," esp. Cap. II, §§ 2–5, 8; Cap. III, §§ 1–2, 4; Cap. V, §§ 1, 9–10, 50–51, 57–58, and of *Puffendorf*, "De Jure Nat. et Gent.," esp., Lib. II, Cap. I, §§ 5–8; and Cap. II, III. Cf. also his dissertation "De Statu Hominum Naturali." The attempts to correct the doctrines of Hobbes by both authors, and those of Spinoza by the second, are remarkable, but it cannot be said that their logic is in truth overcome.

# CHAPTER VIII

## CONCLUSION. NATURALNESS OF POSITIVE AND NATURAL LAW

CRITICAL SOLUTION OF THE PROBLEM. — PHENOMENAL SIDE OF LAW AND ITS HYPERPHENOMENAL PRINCIPLE. — LEGITIMACY OF THE TWO CONSIDERATIONS. — ERRORS OF THE EMPIRICISTS AND JUS-NATURALISTS. — NATURAL LAW AS A DEONTOLOGICAL NEED AND AS THE GOAL OF HISTORICAL DEVELOPMENT. — DELUCIDATIONS AND RECAPITULATIONS.

§ 194. *Critical Solution of the Problem.* Only the new critical philosophy can definitely solve the inveterate equivocations about the concept of nature. But it has not been adequately developed as regards law, since it has been but partially understood and applied. A duplicate line of considerations (as we have seen) can and should be based on criticism. On one side, it enables us to recognize and even to state "a priori" the naturalness of all law in the phenomenal line — of law, that is, as a fact; on the other side, it enables us to obtain from human nature, absolutely considered, the principle of duty and law as a need inherent in the essence of personality and universally valid over and above all fact.

§ 195. *Phenomenal Side of Law and its Hyperphenomenal Principle.* In general doctrine, however, after a certain time,[1] the first class of considerations conquers

[1] We allude to the intense but brief rationalistic season which followed the juridical speculation of Kant and Fichte. Cf. *Del Vecchio*, "La Dichiarazione dei diritti dell' uomo e del cittadino

the second, with which, though remaining distinct, it can and should coexist. It is generally admitted, with ever increasing unanimity, that positive law is a natural fact; the historical explanation shows this, doing away with many of the prejudices against it,[2] but the existence of natural law as a criterion of reality, including positive law, is denied, because that first concept of nature deprives law of all but its phenomenal side. Thus the denial of natural law becomes, as it has been for a century, a kind of dogma,[3] being thought a necessary consequence

nella rivoluzione francese," p. 63 et seq. For a complete bibliography, *Warnkönig*, "Rechtsphilosophie als Naturlehre des Rechts," 2 Ausg. (Freiburg, 1854), p. 137 et seq.; cf., also, *Meister*, "Lehrbuch des Natur-Rechtes" (Frankfurt a / O., 1809), p. 123 et seq.

[2] For the gradual penetration of this concept into juridical philosophy, cf. *Carle*, "La vita del diritto," Pt. II, Lib. II, Cap. IV; *Gabba*, "Alcuni più generali problemi," esp. Series I (Turin, 1876), p. 10 et seq.; *Fragapane*, "Il problema delle origini del diritto," Lib. I, Cap. IV; "Obbietto e limiti della Filosofia del diritto," Vol. I, Cap. II. Cf., too, Pt. I, Cap. VI, p. 32, ante. It would be superfluous, after what we have said, to insist further on this point, that the fact that positive law is an historical and social phenomenon does not prevent it from being, in a proper sense, a natural phenomenon. Vide Pt. III, Cap. II, and § 180, and n. 16, p. 285, ante; and § 195, and n. 5, p. 319, post.

[3] *Zitelmann*, "Die Möglichkeit eines Weltrechts" in "Allgemeine österreichische Gerichts-Zeitung" (Vienna, 1888), n. 25, p. 193, writes, "We live scientifically in the strange situation that in many circles it is held as 'contra bonos mores' for a jurist to maintain any, even a Platonic, relation with the seriously compromised natural law." It would be easy to show in other ways that the idea of natural law, notwithstanding that it has been tabooed by the dominant philosophical schools, is still, as it always has been, most active in juristics. And we may add that its disappearance, if it were possible, would indubitably mark a regress in the elaboration and development of positive law. The beneficial and necessary function, which it exercises in that respect, in other words, its efficiency in promoting juridical progress, is admitted by those of its adversaries who have been impartial in their judg-

of the naturalness of positive law. Here the saying of Leibniz, that philosophers are often right in what they affirm and wrong in what they deny,[4] is again proved. The negation is unjustified in this case, because it erroneously supposes an absolute antinomy or objective incompatibility between the two different ideas of nature, which criticism teaches should be reconciled in the very act of differentiation. It is true that positive law is a datum of experience and can, as such, be understood and explained as a phenomenon, that is, can be given a place, coherently in the system of natural productions.[5] But it is equally true that law has essentially

ment. *Maine*, for example, wrote in "Ancient Law," "I know no reason why the law of the Romans should be superior to the laws of the Hindoos, unless the theory of natural law had given it a type of excellence different from the usual one . . . It is impossible to overrate the importance to a nation or profession of having a distinct object to aim at in the pursuit of improvement" (p. 78). "The natural law of the Romans . . . has rendered its greatest service to civilization in enfranchising the individual from the authority of archaic society" (p. 258). Cf. *Graham*, "English Political Philosophy from Hobbes to Maine" (London, 1899), esp. 377 et seq., where, even in regard to the above declarations, it is stated that Maine's opposition to natural law is ill-founded. Even *Vanni* in "Maine," p. 33, admits that "with all its errors in method, the doctrine of natural law had strongly co-operated to insure the triumph and consecration of the juridical recognition of new and higher ideals of social justice." Cf., for particular proofs in this case, *Ruffini*, "La libertà religiosa," Vol. I (Turin, 1901), p. 232 et seq.; *Pacchioni*, "Corso di diritto romano," Vol. I (Innsbruck, 1905), p. 213 et seq.; and the other writers cited in n. 21, p. 330, post. Other discussions on the school of natural law can be found in *Brugi*, "Per la storia della giurisprudenza," "Il periodo del diritto naturale in Germania," in "Riv. ital. per le scienze giurid.," Vol. XXXII, 1901, p. 404–22.

[4] Vide *Leibniz*, "Opera Philosophica," ed. by Erdmann (Berol, 1840), p. 702.

[5] On this point Ardigò in "Sociologia" (Vol. IV of "Opere filosofiche") (Padua, 1897), p. 72, "Positive law is a natural formation of the social whole, which has grown to what it is by passing from the

a hyperphenomenal significance, inasmuch as it tends to institute an ethical order and attributes values, independent of physical actualization — without which it would not be law. In every juridical proposition, therefore, there is a moment of transcendence or indication of duty which is logically superior to phenomena, within whose bounds it does not entirely lie. While the affirmance and observance of law is positive (for that matter, inobservance is equally so), its principle is metaphysical. The "eternal seed of justice," the foundation of its idea, is not furnished by nature, considered as the complexity or succession of empirical facts, but by the essence (or nature) of man, which comprehends and transcends other nature, and is in itself autonomous, and hence

indistinct to the distinct (by a law common to all natural formations.") Cf. *Brugi*, "L'opera di R. Ardigò nella Filosofia del diritto" in "Atti del Reale Istituto Veneto," Vol. LVI (1897–8), p. 821–65, esp. p. 833 et seq. Similarly wrote *Wautrain-Cavagnari*, in "La Filosofia del diritto secondo la scienza moderna" (Bologna, 1888), p. 9: "Law, there can be no doubt, is a natural formation. From this point of view it is governed by the same laws as govern the evolution of all phenomena." Vide, also, for the naturalness of juridical and social facts, *Brugi*, "Introduzione enciclopedica alle scienze giuridiche e sociali nel sistema della giurisprudenza," 4th ed. (Milan, 1907), p. 19 et seq., where Romagnosi's thought is opportunely recalled. Cf., esp., "Introduzione allo studio del diritto pubblico universale," Cap. II, §§ 18, 89. With the same belief, among the Italian jurists are *Vadalà-Papale*, "Morale e diritto nella vita," *Schiattarella*, and many others. For the special conditions of genetic research applying to juridical and social formations, the works of *Fragapane*, "Il problema delle origini del diritto," Lib. II, and "Obbietto e limiti della Filosofia del diritto," Vol. II, Cap. III, are noteworthy. In reference to method, we can cite *Gabba*, "Alcuni più generali problemi," esp. Series I, Lect. III–VI; Series II, p. 108–30, who in this and in other works, as well as in his famous "Philosophie du droit de succession" ("Essai sur la véritable origine du droit de succession," for which he was honored by the Academy of Brussels, May 5th, 1858) anticipates many beliefs of to-day.

susceptive of rights and duties. How the principle of law follows and is deducible "a priori" from human nature, we have already shown.[6] Now we reassert once more that this principle is valuable as a criterion to weigh the specific grades of truth in various juridical propositions (be they positive or not). In other words, it can weigh the justice of their intrinsic content while their formal quality of juridicity, which makes them measurable by this test, remains secure, and while, on the other hand, as far as regards positive juridical propositions, the historical or phenomenal explanation which is applicable to them as to every other datum of experience, even not juridical, remains entirely unaffected.

§ 196. *Legitimacy of the Two Considerations.* Every historical proposition or institution therefore, which is recognized as containing the logical genius of law, is subjected with equal legitimacy to two considerations which correspond to and are connected with the two fundamental concepts of nature. In the first place, an attempt can well be made to acquire analytically a knowledge of the genesis or natural formation of the institution itself as fact; then the examination of the determining coefficients and conditions lead to the elucidation of the relative necessity of the datum, and the study is the more complete as this theoretically predetermined goal is neared. In the second place, leaving purely empirical necessity, there is a desire to determine the value of this test rationally; what is sought, therefore, is if and how far it harmonizes in this idea with the supreme principle, which is implied in the nature of an intelligent being as a right superior to phenomena, and in this sense it can well be called natural. But it is in this sense only. Since it is clear that we

[6] Cf. Pt. III, Cap. IV, V, p. 258, ante.

cannot interchange or confuse the two considerations without falling into paralogisms similar to those with which the history of doctrines of this kind is for the most part interwoven. It would be improper to attribute to natural law a mode of phenomenal being or actual existence, for, though found in experience, it is essentially metempirical and deontological; and it would be equally illegitimate to infer the non-existence of law as a right and an ideal because it does not exist and have its being as phenomenon.

§ 197. *The Errors of the Empiricists and Jus-Naturalists.* If errors of the first kind are, as we have seen, frequent in the ancient schools of the "jus naturæ," those of the second class are often made in the school of modern positivists. The internal correction which (because of the development of criticism) took place in the conception of natural law,[7] was not sufficiently noticed

[7] This correction appeared, as it is known, even in name, which was changed by many from natural ("Naturrecht") to rational law ("Vernunftrecht"). We believe, however, that even the first term can be retained — it was never abandoned by everyone — for, when properly elucidated, it has the advantage of immediately showing the ontological basis of law, while the second refers to the method or "principium cognoscendi." That natural law could and should be, with regard to this, rational, was known, at least in the abstract, even before the complete reformation in method. For example, *Winkler*, the great precursor of Grotius, spoke of "jus rationale," "Ratio est proximus fons juris humani," "Principiorum Juris Libri V" (Leipsic, 1615), Lib. I, Cap. IX, Lib. II, Cap. V; vide, further, Lib. I, Cap. X, Lib. II, Cap. IX; cf. *Kaltenborn*, "Die Vorläufer des H. Grotius auf dem Gebiete des jus naturæ et gentium" (Leipsic, 1848), I, p. 239 et seq.; II, p. 45 et seq. Grotius and Hobbes in different ways both refer natural law to "recta ratio." Cf. n. 34, p. 311, ante. *Leibniz* wrote in "Observationes De Principiis Juris," § 3, in his "Opera," ed. by Dutens, Vol. IV, Pt. III, p. 270: "Jus naturale est *quod ex sola ratione naturali sciri potest.*" Vide also *Thomasius*, "Fund. Jur. Nat. et Gent.," Lib. 1, Cap. V, § XXIX. Thus even in 1723, *A. F. Glafey* could write a "Geschichte des Rechts

in the neo-dogmatism of the empiricists; they continued to raise incongruous objections and make attacks on this conception which are comprehensible only in relation to antiquated forms of doctrine. The confutation of natural law, which was begun and prosecuted by modern positivists, came logically very late, that is, after the conception of this law had lost the primitive pseudo-empirical or pseudo-historical elements through the works of its protectors — and after, we may note, by the very protectors of natural law had been formed, too, the bases for a scientific treatise on the phenomenology of law, inasmuch as it is comprehended through its historical position within the limits and forms of the empiria.[8] What is today believed to be opposed to the theory of natural law is the result of the fundamental equivocation denying the order of truth proper to natural law and attributing

der Vernunft" as the first part of his "Vernunft- und Völkerrecht," which he published then separately at Leipsic in 1739; cf. *Landsberg*, "Geschichte der deutschen Rechtswissenschaft," III Abth., I Halbb. (Munich, 1898), p. 93. For the use of the expression "Law of Reason," alternately with "Law of Nature" in old English jurisprudence, cf. *Bryce*, "The Law of Nature," p. 165.

[8] It is so apparent that criticism had shown also this way, that the founder of the historical school of law, Hugo, could refer directly to Kant and declare that he was his follower in the determination of his exclusively empirical formula. Vide *Landsberg*, "Kant und Hugo," p. 670–86; cf. *Brugi*, "Introduzione enciclopedica alle scienze giuridiche e sociali," p. 39 et seq. He was of course wrong, as we have shown in § 67, in that he thus ignored what is the eminent and characteristic quality of Kantian doctrine — the necessity of a metaphysical basis of law. But we must remember, nevertheless, the empirical or historical treatise found its proper premise in the critique of reason, which, although the enemy of empiricism as a system, still gives such a method of treatment an adequate position, that is, one which is subordinate and non-exclusive. We can recall to affirm this that we owe the first program of a universal comparative science of positive law (cf. § 186, ante) to a cultivator of rational law in a critical sense; such as, P. A. Feuerbach.

to it an untrue meaning. In substance, the objection to natural law is that it is not positive, and fault is found with a law whose only pretense is to act as a criterion over phenomena for not being positive, and for not appearing as a datum of experience. Implicitly or explicitly, the positivist school denies the quality of law to that which has no historical actualization, thus making a postulate of its conclusion.[9]

§ 198. *Natural Law as a Deontological Need.* The only partial justification which can be adduced in favor of this defective reasoning is that the dogmatism of the ancient jus-naturalists led to many vices. When they assume, for example, that natural law is the law common to different peoples, that is, the law which is commonly observed,[10] they justify to a certain extent

[9] The following passage from Vanni's "Lezioni," p. 281 et seq., shows this manner of argument, too frequent on this subject, "The theories of natural law hold that there is another law besides positive law which exists in nature. . . . But, this statement is in contrast . . . with experience. We have already seen that the only sphere where experience shows us law as a reality is the historical sphere, and that the only really existing law known to us is positive law. . . . There is not, therefore, and cannot be a different law; law does not exist in nature and cannot be given by nature." Cf., also, his "Maine," p. 34. A vigorous and clear confutation of these errors, characteristic of modern positivism, has been made by *Petrone* in his valuable work "La fase recentissima della Filosofia del diritto in Germania," Sec. II, Cap. III, esp. p. 233 et seq.

[10] Cf., for example, *Cicero*, "Epistulæ Tusculanæ," Lib. I, Cap. 13, § 30, "Omni autem in re consensio omnium gentium lex naturæ putanda est." Vide ibid., Cap. 15, § 35. For the improper assimilation of natural law into the positive law of all peoples, cf. Pt. I, Chap. IV, p. 21, ante. The wavering of the Roman thought as to the concepts of "jus naturale" and "jus gentium" is well known; cf. *Maine*, "Ancient Law," Ch. III; *Hildenbrand*, "Geschichte und System," 1 Bd., § 149; *A. J. Carlyle*, "A History," Vol. I, p. 36 et seq.; and we may note that in modern times Grotius, for example, in "De Jure Belli ac Pacis," Lib. I, Cap. I, § XII, admitted

the contrary argument of the empiricists, based on the historical variability of law. The error here lies in the stating of the problem, and in the tacit supposition of both schools that the truth of natural law depends on its translation into phenomenon or positive being. Thus, when the positive law of an hypothetical primitive age is considered natural in contradistinction to that of subsequent periods, the fact that the law of all ages is in a sense equally natural is lost sight of, while, if the ideal end is meant by nature, nothing is more arbitrary and unjust than to suppose that its full attainment was made in the earliest age. On the contrary, we must admit that this event could not take place at the beginning, but must mark the end of the process, for it is the part of all empirical development, as we have shown,[11] to give only little by little its reason for existence—which is virtually contained in its beginning. What appears first temporally is generally the furthest from its nature teleologically considered, while the adequate expression of its nature is given last in the series of experience as the fulfillment of its growth. This governs natural law as well as human nature, from which it springs. The constitutional and characteristic properties of personality are shown only after development, determined "by the constant explication of the human mind over its own nature," to quote Vico,[12] and by the same stages "the eternal seeds of justice, hidden in the human race," as it were, keep developing "from

a "probandi ratio popularior" of natural law to be that by which it was inferred "juris naturalis esse id, quod apud omnes gentes, aut moratiores omnes tale esse creditur." The incongruity of this transference was remarked in part by *Puffendorf*, "De Jure Nat. et Gent.," Lib. II, Cap. III, §§ VII–IX.

[11] Cf., § 158, ante.

[12] "Scienza nuova" (1), Lib. II, Cap. IV.

the childhood of the world" in "proven maxims of justice."[13] We should look upon history in its organic character as the unfolding of an implied purpose.[14] In this sense, the series of particular positive laws appear to us as unified by the tendency toward the development of natural law. This tendency, grasped by the mind "a priori" as an absolute and universal necessity, superior and anterior to any application in experience, develops in it through a long and laborious historical gestation. This should not be taken to mean that natural law begins to be true or becomes law only at the moment when it is recognized and actualized (for this would throw us into the old error); the additional positive recognition does not result in value or truth, but is, at the most, a consequence or result of its value and truth. Observance or non-observance "per se," as facts of the empirical order, do not affect the intrinsic significance of the principle, which is essentially transcendental, and which is self-sufficient in its sphere regardless of its unrecognition or violation in fact.[15] That facts can exist con-

[13] *Vico*, "Scienza nuova" (1), Lib. II, Cap. IV. We may cite the words of *Seneca*, "Epistula" CXX, "Desideras dici, quomodo ad nos prima boni honestique notitia pervenerit. Hoc nos docere Natura non potuit; *semina nobis scientiæ dedit*, scientiam non dedit." Cf. *Cicero*, "De Finibus Bonorun Et Malorum," Lib. V, Cap. XXI.

[14] For this regulative principle (which should not be wrongly dogmatized in the Hegelian manner) see, *Kant*, "Ideen zu einer allgemeinen Geschichte in weltbürgerlicher Absicht," esp. 8 Satz. Cf. *Masci*, "La libertà nel diritto e nella storia secondo Kant ed Hegel" in "Atti della Reale Accademia di scienze morali e politiche," Vol. XXIV (Naples, 1903), esp. p. 536 et seq. Vide, also, *Tarantino*, "Il principio dell' Etica e la crisi morale contemporanea" (Naples, 1904), p. 21.

[15] We cannot omit reference to an excellent but little known passage in Leibniz, in which the truth of this proposition is shown: "Doctrina juris ex earum numero est, quæ non ab experimentis sed

trary to law is the tacit presupposition of every juridical doctrine; hence, in relations between positive and natural law, we must always admit of the possibility of a contrast, in which the latter, as far as experience goes, succumb.[16] This has actually occurred in the course of

definitionibus, nec a sensuum, sed rationis demonstrationibus pendent et sunt, ut ita dicam, juris, non facti. Cum enim consistat justitia in congruitate ac proportionalitate quadam, potest intelligi justum aliquid esse, etsi nec sit, qui justitiam exerceat nec in quem exerceatur, prorsus ut numerorum rationes veræ sunt, etsi non sit, nec qui numeret nec quod numeretur, et de domo, de machina, de re publica prædici potest pulchram, efficacem, felicem fore, si futura sit, etsi nunquam futura sit. Quare mirum non est harum scientiarum decreta æternæ veritatis esse." *Leibniz*, "Juris et Aequi Elementa," ed. by Mollat, p. 24. In the same sense, *Hubner*, "Essai sur l'histoire du droit naturel," Pt. II, p. 425, has written, "Suppose that human legislators have made unjust and contradictory laws, contrary to those of universal legislation, their mistake or injustice no more destroys natural law than a bad proof or false calculation of a mathematician or geometrician of little skill destroys the reality and certainty of mathematics."

[16] Even those who (like, for example, the Roman jurisconsults or, in modern times, Vico) try to reconcile the two concepts of natural and positive law, expressly admit the possibility of a discrepancy between them. This the Roman jurisconsults did, for example, in regard to slavery; vide Inst. 1, 3, 2; Dig. 1. 1. 4. (*Ulpian*); Dig. 1. 5. 4, 1. (*Florentinus*); Dig. 50. 17. 32 (*Ulpian*); Dig. 12. 6. 64 (*Tryphoninus*), etc. The opinion of *Perozzi*, who thinks all the passages of the Roman jurisconsults which hold that men are free under natural law are interpolated, is unique. "Istituzioni di diritto romano," Vol. I (Florence, 1906), p. 73, n. 3. Cf. contra, *Longo*, "Note critiche a proposito della tricotomia jus naturale, gentium, civile" in "Rendiconti" of the "Reale Istituto Lomb. di scienze e lettere," Series II, Vol. XL (1907), pp. 632–40. Vide, also, *Voigt*, "Das Jus Naturale Aequum Et Bonum und Jus Gentium der Römer," 1 Bd., p. 279 and n. 444, p. 283, 296, 332, 405; IV Bd., 1 Abth., p. 7 et seq., 19 et seq., 45 et seq., 51 et seq.; *Leist*, "Altarisches Jus Gentium" (Jena, 1889), p. 513 et seq.; *Costa*," La Filosofia greca nella Giurisprudenza romana" (Parma, 1892), p. 16 et seq.; *Gradenwitz*, "Natur und Sklave," p. 21 et seq. For the teachings of

history. Only the blindest of dogmatists would be able to ignore that there have been occurrences of injustice in the juridical history of mankind. What we expect of history, and what it actually shows us, though with much wavering and deviation, is that natural law is always making for recognition and will ultimately triumph.[17] The postulate of the final triumph of justice is pictured, for reasons which we have given, as a return to an original state in which justice ruled uncorrupted. In like manner, the mental attainment of universal ideas is interpreted as a recollection of primitive knowledge.[18] Subtracting, by mature critical reflection, what illusions or impropriety, or we may better say what ingenuous and unconscious symbolism, there is in conceptions of this sort, and we have left as true the fundamental fact that man has a predetermined end in himself, toward which his development must tend; that a process is necessary in experience by which he may "rejoin his nature," and "celebrate" it, to quote Vico, that is, "become" that which he "already is within himself." The Platonic ἔρως and the Viconian "vis veri" denote this intrinsic potentiality and vocation of man, from

Vico in this matter, which tend to the distinction of the true and the certain, vide esp. his "De Uno Universi Juris Principio et Fine Uno," §§ LXXVII, LXXXII et seq.; "Scienza nuova" (1) Lib. II, Cap. IV; (2) Lib. I, Degn. CIV et seq., CXI, CXIII et seq. Cf. *Cantoni*, "Vico," p. 103 et seq., where this point is clearly shown.

[17] In this sense, for example, *Rosmini* in "Filosofia del diritto," Vol. II, pp. 951–53, speaks of "a progress towards the natural construction of civil societies," that is, so made that "the very nature of things leads society insensibly toward it."

[18] Referring to this Platonic doctrine of ἀνάμνησις, *Petrone* in "La fase recentissima della Filosofia del diritto in Germania," p. 185, states felicitously that it "is more of a poetic deformation of a healthy philosophical principle than a principle false in its nature." The same can be said of many doctrines in the philosophy of law, as we have shown in Pt. III, Cap. VI, p. 277, ante.

which springs the knowledge of a duty to be fulfilled, and almost a presentiment of a higher reality to be attained. The original disposition of being acts in all contingencies beyond particular individual intentions,[19] and produces by natural ways that which seems to form the metaphysical signification of history — the gradual

[19] In this transcendency is shown the law, which Wundt to-day calls the "heterogeneity of ends" ("Heterogenie der Zwecke," vide *Wundt*, "Ethik," I Bd., p. 274), which was well-known to Vico, who described it in his magnificent phraseology as follows: "Albeit that it was by men that this World of Nations was formed . . . ; yet to its present state this World has without doubt come from a Mind in itself diverse and often contradictory, and always superior to those particular ends which men have proposed for themselves, which restricted ends, made means to serve more amply ends, it has always adopted to conserve Mankind on earth. Men wished to avail themselves of bestial lust and to scatter their seed, but the result of their attempt was the chastity of marriage, whence came the Family; the Patriarchs wished to exercise unlimited paternal control over their clients, and Cities grew up; the Nobles wished to abuse their freedom as Lords over the masses and fell into the slavery of law, which has resulted in popular liberty; the Free Peoples wished to escape from the control of their laws and were subjected to monarchies; the Kings, with all the vices of the dissolute at their command, cowed their subjects, and were then forced to bear slavery at the hand of stronger Nations; the Nations wished to dissipate themselves and were saved from it by the Solitudes from which they arose like the phœnix. That which accomplished all this was Mind, because men accomplished it with intelligence. It was not Fate, because they did it through Election. It was not Chance, because they did it with perpetuity, always so acting as to accomplish the same things." *Vico*, "Scienza nuova," (2) Conchiusione, p. 572. Cf., on this proposition, the analysis of *Vidari*, "Ancora dell' idea di progresso" in "Rendiconti" of the "Reale Istituto Lombardo di scienze e lettere," Series II, Vol. XXXVIII, 1905, p. 999 et seq.; and for a comparison of the Viconian and Hegelian doctrines, *Croce*, "Hegel," Cap. III. Vide, also, for the application of these principles to law, the observations of *Kohler*, "Rechtsgeschichte und Weltentwicklung" in "Zeitschrift für vergleichende Rechtswissenschaft," V Bd., 1884, p. 328 et seq.

advent of the ideal in the order of phenomena, and the progressive equation of fact and ideal. Even in respect to law, the reality of experience confirms and proves the postulates of reason again, we can say, in their inverted order. Empiricism itself has had to recognize that many juridical needs, once upheld by pure speculation, and rejected by the empiricists of earlier days as tainted with metaphysics,[20] have been and are constantly actualized historically.[21] In fact, in this respect we can freely say that empiricists are but tardy metaphysicians, as, vice versa, metaphysics can be called an anticipation of experience. It is certain that the absolute value of personality, the equal freedom of all men, the rights of

[20] Schopenhauer's observation on the value of confutation which is attributed in philosophical disputes to mere name (for example, "That is idealism, that is Spinozanism, that is pantheism," etc.) is opportune and noteworthy. Vide *Schopenhauer*, "Eristische Dialektik," Kunstgriff 32 ("Aus Schopenhauer's handschriftlichem Nachlass," II Bd., p. 101 et seq.). Cf. *Bentham*, "Treatise on Political Sophistry," "Sophisme des anti-Penseur" (ed. by Dumont, Vol. I, p. 512 et seq.).

For the word "metaphysics," cf. *Croce* in "Critica," VI (1908), p. 49; for the "metaphysics of the antimetaphysicians," vide *Martinetti*, "Introduzione alla metafisica," p. 8 et seq.; cf. *Liard*, "La science positive et la metaphysique" (Paris, 1879), Cap. IV, V.

[21] Cf. *Del Vecchio*, "La Dichiarazione dei diritti dell' uomo e del cittadino," Cap. V. Vide also *Filomusi-Guelfi*, "La codificazione civile e le idee moderne che ad essasi riferiscono," p. 7 et seq.; *Scherger*, "The Evolution of Modern Liberty" (London, 1904), pp. 11–14. Particularly noteworthy is the certainly unsuspected evidence by *Gierke*, in "Naturrecht und deutsches Recht," p. 24; "The new tendency (scil. the historical conception of law) not only could not object to the remodelling made by the abstract school, but also it could not prevent the continued development of certain principles of natural law. Indeed it often saw itself compelled to finish with its own hand the work begun by its conquered opponent. So natural law gains material victories long after the collapse of its formal power."

every associate to be an active as well as a passive participant in social laws, and in general, the principles in which the true and most profound substance of the classic philosophy of law, "juris naturalis scientia," may be found, have already received marked sanction in positive legal systems, and yet greater "reform" may be counted upon.

§ 199. *Natural Law as the Goal of Historical Development.* On our attempt up to this point to establish the ideal which synthesizes the eternal truth of law, we have shown as well the goal of its historical development. For we can see that this evolution leads to a constantly increasing recognition of human autonomy and to a corresponding transformation of social assets, to which this principle should apply while remaining unsatiable "in se." The transitions, empirically effected from the régime of status to that of contract,[22] from aggregation ("Gemeinschaft") to association or society ("Gesellschaft"),[23] and others analogous to them, which mark the historical process of law, are but partial expressions or aspects of the capital fact, which must be regarded in its universality as the fulfillment of a supreme necessity of

[22] It seems to us that the well-known formula of *Maine*, "The movement of the progressive society has hitherto been a movement from Status to Contract," contained in his "Ancient Law," p. 170, had in his mind a more restricted and less philosophical significance, than that which it really bears. So the objections of *Vanni*, "Maine," p. 79 et seq., based on an exclusively "privatistic" concept of contract, do not affect in our way of thinking the essential truth of the theory. Cf. *Del Vecchio*, "Su la teoria del contratto sociale," (Bologna, 1906), and the other writings there mentioned. We may recall that *Spencer* in his "The Principles of Sociology," Pt. V, "Political Institutions," esp. Caps. XVII, XVIII, confirmed and developed the concept of Maine.

[23] Vide *Tönnies*, "Gemeinschaft und Gesellschaft, — Abhandlung des Communismus und des Socialismus als empirischer Culturformen" (Leipsic, 1887).

reason. Correlated to this process and in conformity to this necessity, a world-wide human law ("jus cosmopoliticum," "Weltbürgerrecht") or a juridical co-ordination of all mankind (first dreamt of by the Stoics)[24] tends to positive formation. This is evidenced by the gradual abandonment of the limitations to which the recognition of personality was originally subjected, by the progressive extension of social groups and of relations of every kind among them, to which the legislative thought and the custom of various peoples[25] are made to conform. The

[24] See *Hildenbrand*, "Geschichte und System," I Bd., p. 510 et seq.; *Janet*, "Histoire de la science politique," Vol. I, p. 241 et seq.; *Carle*, "La vita del diritto," p. 131; *Willoughby*, "The Political Theories of the Ancient World" (London, 1903), p. 202; *Jellinek*, "Allgemeine Staatslehre," 2 ed. (Berlin, 1905), p. 294. Cf. *Del Vecchio*, "Il fenomeno della guerra e l'idea della pace," 2nd ed. (Turin, 1911; Germ. Transl., Leipsic, 1913), Ch. IV, § 4; *Thomas Balch*, "International Courts of Arbitration," p. 9.

[25] For this essential quality of juridical evolution, see §§ 44 et seq., ante, and the authorities there cited. We can point out also that Vico emphasized progress, by which "cities united for common interest in wars, alliances, and trade, and 'the natural civil laws' finally form one natural law . . . of nations united together in one great city of the world, which is the law of mankind." *Vico*, "Scienza nuova" (1), Lib. II, Cap. V. Cf. *Fragapane*, "Il problema delle origini del diritto," Lib. IV, Caps. II, III, and *Tarde*, "Les transformations du droit," 2 ed. (Paris, 1894), p. 59 et seq., "An admirable and wonderful progress, which no one has taken the trouble to notice, but which accompanies nevertheless all juridical evolution, consists in the continual enlarging of the relations of law. These relations, at first restricted to a small and consanguineous group, which was extended as far as possible by adoption and legendary relationship until it included all sorts of fictions and imaginary relations, were then extended, now by feudal agreement, now by contract of corporate association to the largest circle of neighbors, associates, or citizens of nearby cities, later, through the idea of nationality, to millions of citizens, and by the ideas of Christianity, Islamism or other religious communities to hundreds of millions of unknown peoples, and at

fundamental identity of human nature appears in the particular laws of nations and directs their development necessarily toward a common goal, that is, to that universal law whose principles are predetermined and implied in nature, so that reason can deduce them "a priori" and recognize their validity before they are verified "a posteriori," as expressed and observed in certain actual contingencies, and independently of this verification. The antithesis sometimes shown between the speculative ideal and historical fact, between the φύσει δίκαιον and the θέσει or νόμῳ δίκαιον, or between natural and positive law[26] cannot, therefore, be converted into an argument against the admissibility of the first term, since it is essentially valid over and above the second, and so much

last, through the ideas of humanity, laws common to mankind and of natural law, to all men. And, while it extends geographically, it deepens, including lower classes of society, woman, the plebeian and the slave in the great brotherhood of Law." Cf. also, in confirmation and illustration of this, *Zitelmann*, "Die Möglichkeit eines Weltrechts"; *M. Kechnie*, "The State and the Individual" (Glasgow, 1896), Cap. XI, esp. p. 150 et seq. It is not without good reason that *M. Smith* concludes his writing on "Jurisprudence" (New York, 1908), p. 42, as follows: "For centuries to come, perhaps during the whole future existence of the human race, there will be ample fields for juristic activity within the single nations; but the great task of the jurisprudence of the future will be to interpret the social will of federated humanity and to express in increasingly accurate and logical form the universal sentiment of justice."

[26] *Ardigò*, "Sociologia," p. 175, held directly that "there must always be a struggle between natural and positive law." This decision was forced upon him because he attributed no objectively certain content to natural law, but only admitted it as an "indistinct potentiality" (p. 174). But the truth is that natural law is not essentially indeterminate, and does not lose its authority upon actualization. A correspondence between the two distinct orders of truth is possible and can no more be dogmatically denied, than it can be asserted "a priori."

the less can the lack of historical or positive sanction be opposed to natural law, the earlier the empirical phase is to which the observation is referred. The objections of this kind to the truth of natural law which are the most frequent are the least valid philosophically. It can be remembered, for example, how Bentham undertook to confute the maxim of the natural liberty of man, enunciated by the "Declaration of the Rights of Man and of Citizens"—"All men are born free. This beginning contained a palpable falsity. Study the facts. All men are born in a state of subjection — in fact, of the most absolute subjection. A child is continually dependent because of its feebleness and its needs."[27] The observation of facts, however, is not enough to establish the existence or non-existence of a law, just as a law cannot be adduced by proving that a definite event has happened or not.[28] What observation discovers empirically in the field of the positive does not invalidate the criterion and law, which reason sustains deontologically.[29] We can

[27] *Bentham*, "Sophismes anarchiques," in "Œuvres" cit. T, I, p. 553.

[28] *Bentham* himself could not avoid seeing that the juridical affirmation of freedom was directed to protect it against empirical denial and actual violation. He advances the reply to his argument. "This contradiction, you may say, is only apparent. We must distinguish law and fact; men slaves in one sense are free in another—free in relation to the laws of nature, slaves in relation to political laws, which are vainly called laws but which are not such, since they contradict the laws of nature." And so he insists upon his earlier sophistry, and writes, "This is the subtle language to which recourse is had when one wants to deny what is, when one is embarrassed by well-known facts, when one has the evidence of truth against one"! "Anarchical Fallacies," "Work," Vol. II, p. 489, ed. by Dumont, Vol. I, p. 553.

[29] It is noteworthy that *Ritchie*, one of the severest critics of the jus-naturalistic theory, after noting that the term "nature" has, too, a deontological or normative meaning, adds, "If the term 'natural rights' were always confessedly used in this sense and in this sense

state that freedom is inherent in man, with regard to the transcendental essence of subjectivity, while admitting with Fragapane, "Man is born slave — and his history is only the history of his emancipation";[30] because criticism has taught us to distinguish the truth of phenomenon from that of the ideal norm which governs it, while offering us a means of recognizing its gradual reconciliation in history. The problem of the naturalness of law is philosophically complete with the recognition of the possibility of these two diverse considerations, for both are in accord with the nature of man and are founded in it. Critical idealism is the only system which can give, by the criteria which we have shown, a congruous and wholly adequate solution of this problem.

only, no objection could be taken to it, except that it was an ambiguous way of saying what might be less ambiguously expressed by a direct use of the term 'ought.' *Ritchie*, "Natural Rights," p. 75. Vide, also, the declaration of *Green*, "Lectures on the Principles of Political Obligation," p. 33 et seq.

[29] *Fragapane*, "Il problema delle origini del diritto, p. 262."

# First Appendix

## DEL VECCHIO'S LEGAL PHILOSOPHY

# APPENDIX I

## DEL VECCHIO'S LEGAL PHILOSOPHY[1]

BY HANS REICHEL[2]

Nothing in any science, one would suppose, should be freer from controversy, and more settled, than its fundamental principles. But this expectation is deceptive. The historical development of knowledge often leads far away from a logical arrangement of the objects of knowledge. The reason for this, easy to see, is psychological. According to logic (or, as it were, "de jure") general ideas assume a leading importance, while from the standpoint of experience (or "de facto") sensible things have priority; for experience, first of all, deals with particulars. In this connection, one might denominate the history of knowledge as a continuous ὕστερον πρότερον, in the sense that the author in his book incidentally observes: "quello che nell' ordine psicologico è la conclusione, nell' ordine ontologico è il principio; e solo per questi due estremi termini il soggetto si ricongiunge all' oggetto adeguatamente. La verità non comincia dal momento in cui è conosciuta; e per usare un classico

[1] [This review of the author's "I presupposti filosofici della nozione del diritto" was published in "Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft," Dritte Folge, Band XI (1907), pp. 209–224. It is translated by ALBERT KOCOUREK, Professor of Jurisprudence in Northwestern University, and member of the Editorial Committee for this series. — *Ed.*]

[2] [Professor of Roman Law and Legal Philosophy in the University of Zürich. — *Ed.*]

paragone, la legge della uguaglianza dei raggi vale anche prima che il circolo sia tracciato." [3]

This observation also holds true for the science of law. Logically, of course, "quid jus" always precedes "quid juris"; for before one can determine what is lawful, he must first know what is law. Actually, however, the situation is reversed. There is widespread and thoroughgoing agreement as to particular questions of law — the "quid juris"; the most complicated problems of detail have been in part exhaustively investigated and treated. On the contrary, the higher we climb toward the general and fundamental, the darker and more thorny becomes the path. The summit of this ascent, the question "quid jus?" is surrounded, so it would appear, by a heavy fog. Even to-day the famous and often quoted [4] words of Kant have an undiminished application — "noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht"; [5] and "what is law?" This question might well perplex the jurist who would avoid falling into tautology, or referring to the will of the laws of this or that country at some particular time instead of giving a general solution; just as the question, "What is truth?" would puzzle the logician.[6] Gierke, also, adopts this

[3] [What is the conclusion psychologically, is the beginning ontologically, and the subject can read the object adequately only by these two extreme terms. Truth does not begin at the moment of its recognition; and to use a classical simile, the law of equality of the radii governs before the circle is drawn." —*Ed.*]

[4] See *Trendelenburg*, "Kleine Schriften," II (1871), p. 81; *Rümelin* "Reden und Aufsätze," Neue Folge (1881), p. 317; *Stammler*, "Wirtschaft und Recht," 2d ed. (1906) p. 482.

[5] "The jurists are still looking for a definition for their conception of law." — "Kritik der reinen Vernunft," (Transcendentale Methodenlehre), Cap. I, Sec. I, Kerbach ed., p. 560 [or Meiklejohn's translation (London, 1893) p. 445].

[6] "Metaphysik der Sitten" ("Rechtslehre"), Kirchman ed., p. 30.

thought when he says: "The science of law is neither more nor less fortunate than its sister sciences; after centuries of labor, it has not attained a satisfactory and unobjectionable answer to this question (sc., what is law?) upon a solution of which an understanding of this science itself depends. The effort has not even so much as produced a generally accepted external definition which was possible by the help of the trustworthy delimitation of the sphere of law from other provinces of social life, from the standpoint of their formal attributes." [7] Indeed, "tot capita, tot sensus." Nearly every jurist or philosopher who has reflected on the law, has made his own definition. One may compare by way of illustration the variegated assortment of definitions of law collected by Rümelin, and by Trendelenburg,[8] as well as in the monograph of Baumstark.[9]

The question might perhaps be left at rest with a "non liquet" if it were only a struggle of wits; but far from it, a given definition of law, according to its range and content of idea, produces wide and deep differences which enter into the last details. One has only to call to mind the controversy as to the legal quality of international law. It seems, therefore, and in this we may agree with the author, not only justifiable, but in fact necessary to begin the labor anew, and to build up the foundations of a definition of law from the bottom. The author's monograph entitled, "Il concetto del diritto" is devoted to this laudable undertaking; but before this effort could be commenced it was necessary that the ground be cleared of its great luxuriance of noxious growths in preparation for the planting of the new seed.

[7] "Naturrecht und deutsches Recht" (1883), p. 4.

[8] "Kleine Schriften."

[9] "Was ist das Recht?" (1874).

This was possible only by a critical and philosophical preliminary labor, of which this book is the issue. It contains, therefore, historical-philosophical prolegomena, and especially criteria of the validity of knowledge for a new and independent definition of law.

The concept of a thing, says the author, is the center, as it were, the point of cleavage ("punto d'incontro") between the ideal of the object, on one hand, and the sum of the accompanying isolated, empirical phenomena, on the other. A definition of law which is purely ideal or speculative, and a definition which is purely factual or empirical, therefore, are equally at fault, like all one-sided views. The first error is made by those who proceed from a transcendental ideal of law, conceiving law not as what it is but rather what it ought to be.[10] As we all know, this was the mistake made by not a few of the writers on natural law in their definitions which are founded on an ideal of law; and, consequently, such definitions are without value. However, one would be greatly misled, as may be read between the lines, if he supposed that the author was entirely opposed to the ideas of natural law; on the contrary, he expressly gives them countenance. "Che il diritto sia per essenza sua solo positivo, è un' affermazione gratuita, che non fu nè può essere dimostrata, ma solo creduta in omaggio al dogma di una filosofia passeggiera" — (the author has in mind the school of positivism). "Ora tutti gli argomenti con cui si è creduto di demolire il diritto naturale, riposano semplicemente su quella tesi, e si riducono quindi a mostrare che il diritto naturale non esiste che diritto positivo, ciò

[10] "This concept is an im[illegible] the point in "Tübingen Zeitschrift ff[illegible]aften," Bd. 57, p. 212.

che per vero è fuor di questione." [11] At this point the author is entirely in accord with Carle, Petrone, and others who tilt a lance in favor of natural law. Indeed he aligns himself without reserve with Thomasius [12] who expresses his views of natural law in the following language: "Jus pro lege acceptum est vel naturale, vel positivum. Fundamentum huius divisionis est principium cognoscendi. Jus naturae cognoscitur ex ratiocinatione animi tranquilli, jus positivum requirit revelationem et publicationem," and the author finishes his pertinent statement with the exultant words: "noi teniamo per fermo che l'idea del diritto naturale, come ha resistito alle obiezioni degli scettici e degli empiristi de' tempi andati, così resisterà pure a quelle dei positivisti moderni, e accompagnerà l'umanità anche nell' avvenire." [13]

The error described, in proceeding from a standpoint of ideality, is perpetrated especially by all teleological definitions, therefore, by all those which start out from the actual or supposed ends of law. In this class belongs, for example, the well-known definition of Trendelenburg.[14] The familiar maxim of Kant,

[11] ["That the law in its essence is solely positive is a gratuitous statement which has not been and cannot be demonstrated; but is only believed in tribute to a passing philosophy. Now, all the arguments by which it is purposed to destroy natural law rest simply on this proposition, and reduce to this, that natural law does not exist — as positive law — which in truth is beyond the question."]

[12] "Fund. Iur. Nat. et Gent." I, 5, 29.

[13] ["We regard it as established that the idea of natural law, as it has resisted all attacks of the sceptics and empirics of the past, will therefore also withstand those of the modern positivists, and accompany humanity also in the future."]

[14] "Kleine Schriften," p. 87; "Naturrecht," Sec. 46, 2d ed., p. 83. A work of recent years expressly attaching itself to *Trendelenburg*, is that of *Salvadori*, "Das Naturrecht und der Entwicklungsgedanke,"

according to which "law is the sum of the conditions under which the will of one man can be adjusted to the will of another man under a general law of freedom," [15] also "non è una definizione nel senso proprio, ma un principio razionale che, nella mente stessa del Kant, ha il valore di un ideale." [16] The formal blunder of making a definition out of the end is committed even by such an anti-speculative thinker as Ihering, (who would not otherwise be in point here). In that in his "Geist" as in his "Zweck" [17] he defines law as the protection of interests, the protection of the conditions of life, he substitutes the notion of purpose for a definition.[18] Hegel's paralogism reaches the summit of speculative daring and furnishes at the same time a paradigm for a definition of everything ideal. For Hegel ideas alone are real and substantial. Concept and idea are equivalent; but the phenomenal world is only a method of activity of the idea. "Per conseguenza di ciò, il concetto del diritto sarebbe, secondo la dottrina hegeliana, anche la cagione della realtà del diritto, il motivo generatore della sua esistenza nel mondo empirico." [19]

The exact opposite of Hegelian speculation — to consider now the second, the empirical group of defini-

1905, p. 97. Cf. my remarks in "Philosophische Wochenschrift," II, p. 59.

[15] "Rechtslehre" (Einleitung C).

[16] ["Is not a definition in the proper sense, but a rational principle which in the view of *Kant* himself derived its value from an ideal."] *Stammler*, also, justly finds fault with it, — "Richtiges Recht," 1902, p. 210.

[17] [Translated in this series under the title "Law as a Means to an End."]

[18] Cf. *R. Leening*, "Wurzel und Wesen des Rechtes," 1907, p. 11, seq.

[19] ["As a consequence, the concept of law, according to the Hegelian doctrine, would be also the reason of the reality of law, the generative motive of its existence in the empirical world." ]

tions of law — is agnostic positivism, which is not at all pleasing to the author. If the idealistic metaphysics goes astray by way of over-extension, the positivist doctrine fails in putting aside all ideological considerations. The one school drives the "a priori," and the other school urges the "a posteriori" to the uttermost limit. The first philosophy represents the idea of everything and the appearance of nothing; while the second denotes the appearance of everything and the idea of nothing. Consequently, according to the author, an acceptable definition of law has been hitherto impossible and will always be an utter impossibility for the positivist. The reason is that from pure empirical facts one can never attain to ideas. If one desires to systematize the internal relation of facts, there is always presupposed the concept of this relationlike Münchhausen lifting himself by his own forelock. The efforts, therefore, of the "Historische Schule" which was externally propped up by a little Schellingean philosophy, and internally torn apart by an abortive empiricism, were insufficient to bring forth a serviceable definition of law; but this does not derogate from the value of the contributions made by Savigny and his followers in the study of legal evolution and the social-psychological basis of legal science. Still, that which touches a conceptual and detailed explanation of the chief and ultimate questions of jurisprudence remained apart from the mission of the "Historische Schule"; and it is just to say that it was an unphilosophical school. "Invertendo la massima del filosofo, che vedeva là cominciare il problema, dove per gli altri finiva, la scuola storica accettava qual soluzione ciò che per altri era stato soltanto la proposizione di una difficoltà, ed un motivo di speculare." [20] One illustration will suffice—

[20] ["Inverting the maxim of the philosopher, who discerned as the beginning of the problem what others regarded as the end, the

the much-quoted definition of Puchta[21] — "law is a general conviction (Überzeugung) of the members of a legally organized society"; but this is mere tautology. To attempt to derive the concept of law from legal history or to distill being from becoming, as Krause has pointed out,[22] is like the effort of milking a he-goat.[23] Considerations of the philosophy of history also lead to this judgment. Laws of history which lay down the course of historical development, and likewise the lines of legal evolution, cannot be discovered. Especially, the proposition fails that history unfolds in rigidly patterned cycles;[24] it forces history into a mechanical form which is foreign to it. The law of history, if any such there is, is rather that of constant change which if not illimitable in fact is yet illimitable for the mind. A concept must be eternal; in other words, it cannot be valid only for the past and present, but it must hold for all future. When the "Historische Schule" educes the notion of law solely from the past it goes astray, committing the "fallacia fictae universalitatis;"[25] as the past, since the stream of history never stands still, cannot give hostages for the future.

Little more profitable, according to the author, for the establishment of fundamental juristic ideas, have been the performances of the schools which succeeded to leadership after the decline of the "Historische Schule" —

Historical School accepted as a solution what was for others only the statement of a difficulty, and a motive of inquiry." ]

[21] "Pandekten," Sec. 10.

[22] "Rechtsphilosophie" (1874), p. 19 seq.

[23] This polemic against historicism is, of course, not new; the author himself refers, among others, to *Schuppe* in "Zeitschrift für vergleichende Rechtswissenschaft" 5, 209, and *Stammler* in the "Festgabe für Windscheid," Halle (1889), p. 3.

[24] Cf. *Hegel's* three-part measures, and *Spencer's* rhythm theory.

[25] Cf. *Mill*, "Logic" (Ger. trans. by Scheil [1849], p. 621).

thus the School of Comparative Law;[26] the writers on general jurisprudence ("allegemeine Rechtslehre");[27] the Analytical School.[28] The author would leave untouched the important services of these schools in the upbuilding and extension of positive legal science; and he mentions with special emphasis the writings of Bergbohm, Bierling, Binding, Schuppe, and Thon; yet he thinks that reservation must be made, that the purely empirical-inductive method, which these writers follow, is incapable of providing a successful solution of the ultimate questions of legal science.[29] In particular, comparative law is not adapted to extract a single concept of law out of the manifold abundance of legal phenomena. Comparison always presupposes a standard of measurement, and this standard is an already postulated concept of law. The positivist legal philosophy, and especially general jurisprudence, may not be spared the reproach that it assumes to take upon itself, according to the

[26] Whose program is represented by *Post*, "Ursprung des Rechts," (1876).

[27] Represented by *A. Merkel*, "Ueber das Verhältnis der Rechtsphilosophie zur positiven Rechtswissenschaft" in "Grünhuts Zeitschrift," I, 1 seq.

[28] *Austin*, "Lectures on Jurisprudence or the Philosophy of Positive Law," 4th ed. (1873). With reference to these schools, see the review in "L. C. Bl." (1906), p. 1364, of *Groppali's* "La filosofia del diritto" (1906), p. 118 seq., 148 seq. [The best exposition of this subject is *Pound's* "Theories of Law," reprinted from "Yale Law Journal," December, 1912.—*Tr.*]

[29] The author's scruples against the positivist jurisprudence are the same as may be urged against positivism in general. Cf. my article on *Mill's* inductive method in "Zeitschrift für Philosophie und Philosophische Kritik," Bd. 123, p. 121 et seq.; cf. also the observation of *Ferd. Jak. Schmidt* in "Preuss. J." Bd. 106, p. 538; "induction is an heuristic method for a study of details, but not a scientific method as *Bacon* called it. Philosophy, however, must completely retain this instrument in that it is not a science of particulars." See also, *Kohler*, "Moderne Rechtsprobleme" 1907, p. 16 seq.

author, the practical functions of legal science[30] and reduces legal philosophy to the position of a mere spectator of social life. In a word: The onesidedness of empiricism is equally as inadequate for an answer to the question proposed, as the partiality of speculative idealism.

Various investigators have shielded themselves from this situation; some of them have adopted, therefore, syncretic views. Among the positivists, Spencer is named, who inconsistently and despite his evolutionary phenomenalism, recognizes the proposition of natural law.[31] From the other side, Lasson, in his work on legal philosophy, takes now the idea of law, and then pure empiricism for a starting-point.[32]

It may suggest itself that there is something monstrous in this combination of the "a priori" and the "a posteriori"; but psychologically the contradiction is not great. It is only a step from the proposition that

[30] Concerning this much discussed question in Italian legal philosophy, see *Vanni*, "La funzione pratica della filosofia del diritto" (address), (1894); *Brugi*, "Introduzione enciclopedica alle scienze giuridiche e sociali," 3d ed. (1898), p. 95 seq.; *Groppali*, "La funzione pratica della filosofia del diritto" (1904); and *Levi*, "Per un programma di filosofia del diritto" (1906), p. 103 seq.

[31] *Levi* treats in a critical fashion *Spencer's* notion of natural law — "Sur le droit naturel dans la philosophie de Spencer" ("Contes rendus du II e Congrès Internat. de philosophie," Genève, Sept. 1904.)

[32] "Rechtsphilosophie"; cf. pp. 19 and 176. The Neo-Hegelian *Josef Kohler* undertakes a similar synthesis of idealism and empiricism, but upon a foundation of much more universal knowledge, and with more genius; Cf. "Grünhuts Zeitschrift," XXVIII, 272 seq., "D. J. Z." IX, 27 seq., also the article "Rechtsphilosophie und Universalrechtsgeschichte," in *v. Holtzendorff's* "Rechtsenzyklopädie 6th ed. (1904). [See, especially, Kohler's late work, "Philosophy of Law," in this series.] Berolzheimer ably states the legal philosophy of Kohler [in "The World's Legal Philosophies," in this series] and in "Philosophische Wochenscrift," I, 5 seq., Berolzheimer

reason and reality are identical to the affirmation that reality itself as such is reasonable, that is to say, is the principle and source of all reasoning. "Dall' identificare 'a priori' la ragione col fatto all' assumere il fatto stesso come principio non è in realtà che un passo, ed un inevitabile passo."[33]

The author is little disposed to approve this kind of synthesis; he expressly rejects it. He believes the right course lies between, but not in a combination, of opposites. Ideas do not generate reality, says he, nor does reality produce ideas. Both points of view already noted,

styles himself a Neo-Platonist; cf. my review of his book in "Zeitschrift für Philosophie und Philosophische Kritik," Bd. 129, p. 111.

[33] ["From an identification 'a priori' of reason with fact, to the assumption that the fact itself is the source, is in truth only a step, and an inevitable step."]

I have rarely seen a more pointed statement of the dogmatism of empirical facts as set out by the author than the following words of *Alessandro Levi* ("Programma," p. 18): "Pei positivisti il fenomeno ha un valore assoluto, non nel senso di un 'quid immutabile,' ma bensì nella accezione di un vero ch'e ad esso inerente: 'verum . . . ipsum factum,' diceva il Vico. Il fatto e per noi un assoluto, non perchè sia un 'prius,' un effetto senza causa, una proles sine matre creata, ma perchè ad esso, e ad esso soltanto, se può rivolgere la nostra osservazione, paga di esaurirvisi e aliena dal tentar di penetrare in un misterioso al-di-là. — Diceva l' Ardigò con lucidissime parole, a proposito delle quali non si può senza mala fede giocare d'equivoco: 'Il fatto è divino, la spiegazione è umana.' "

[For the positivist, phenomena have an absolute value, not in the sense of a "quid immutabile," but rather in the acceptation of a truth which is to him inherent: "verum . . . ipsum factum," said Vico. A fact is for us something absolute, not that it is a "prius," an effect without cause, a child without a mother, but because to it and to it alone are we able to address our observation, content to there exhaust it and averse to any attempt to penetrate a mysterious something beyond. In the brilliant words of Ardigò (which cannot except in bad faith turn upon an equivocation), "facts are divine; explanation is human."]

[Attention may be directed, here, to the study contributed by

idealism and empiricism, and not less their fusion, lack that which is first of all necessary to an advantageous examination of the matter in hand — criticism of the faculty of knowledge. Fundamentally, the author aligns himself with Kant. His course, as he proudly asserts, is the "royal road of criticism"; that is to say, of the Kantian critique of reason; and he adopts the motto "back to Kant." The formulation of the problem with which his book commences is Kantian in its sense and phrasing: "è possibile una determinazione obiettiva . . . di ciò che è il diritto? E se è possibile, quali ne sono le condizioni metodiche, cioè come è essa possibile?" [34]

The author's method is self-disclosed. The material of phenomena is to be abstracted; to this extent it is possible to proceed "a priori." Only the form can be an object of consideration insofar as it is the constitutive element of a concept. Form alone is one and eternal, and the truly substantial in the stream of phenomena: [35] "la forma è l'essenza medesima dell' obietto." [36] This form is the gnoseological condition of the possibility of particular phenomena; and, for that reason, form as

Prof. *Levi*, which will appear as a part of Volume VI in this series treating the "Positive Philosophy of Law," by *I. Vanni.—Ed.*]

[34] [" Is an objective determination of the law possible? And if it is possible, what are the methodological conditions, that is to say, how is it possible?"]

One feels involuntarily reminded of *Kant's* statement of the inquiry regarding the possibility and method of knowledge — "Prolegomena," Secs. 4, 5. "Reklamausgabe," pp. 46, 51. An adoption of the Kantian model is also discernible among such Kantians as *Stammler* ("Richtiges Recht," p. 85), where the turn of language — "love without justice is blind"; justice without love is empty — resembles what Kant says concerning intuitions and concepts.

[35] In accord with *Aristotle*, "Met.," xi, 8, p. 1074a.

[36] "The form is the essence itself of the object."

compared with phenomena is an absolute presupposition. Consequently, the effort to derive the concept of thing from experience involves an inversion of the true relation. "Lungi da ciò, che il concetto formale sia una copia imperfetta e sbiadita delle cose concrete e sensibili (come vorrebbe la logica degli empiristi), queste medesime cose non rappresentano in verità se non un parziale riscontro e un atteggiamento passeggiero di quel concetto, che ne è l'essenza, e che si rispecchia intero nella pura ragione." [37]

Law also can be subjected to the same method of consideration. The Kantians, Simmel [38] and Stammler,[39] have been of service in separating the formal element in law from its material content; and further advances in this direction are possible. The problem is not, what is the content of law and how is it ascertained — what are the functions and purposes of law — what is the relation between law and justice? but the question is solely and exclusively as to the form of the concept of law. "Senza enunciare per se alcun giudizio siffatto, senza attribuire i predicati di giusto o ingiusto ad alcun dato oggetto, la forma logica (del diritto) designa solo il carattere proprio di un qualsiasi giudizio di tal natura." [40] A detailed explanation of this thought is not to be had

[37] ["Far from it, that the formal concept is an imperfect and colorless copy of the concrete and sensible thing (as the logic of the empirics would have it), this same thing in truth yet represents a partial counterpart and a passing attitude of the concept which is the essence of it, and which reflects as a whole in pure reason." ]

[38] "Einleitung in die Moralwissenschaft," 2nd ed. (1904).

[39] [*Stammler's* work, "Richtiges Recht," is translated in this series under the title "Theory of Justice."]

[40] ["Without stating in itself any certain opinion, without attributing the predicates just or unjust to any given part, the logical form of the law indicates only the true character of any judgment whatsoever of this nature." ]

in the work under review; the author has expressly reserved that discussion for the study concerning the concept of law to which reference already has been made.[41]

. . . . . .

The foregoing examination will be sufficient to indicate the spirit and tendencies of the book; more detail would not be practicable. The excursuses on the history of philosophy, especially, have been left out of consideration. The author shows a fondness for tracing certain problems through the history of philosophy from ancient times to the present. The utility of this procedure is doubtful. To one who knows the history of philosophy — and whoever has earnestly had to do with legal philosophy may be expected to have acquaintance with the universal history of philosophy — these excursuses will hardly provide anything new. Again, to one who lacks special knowledge of the history of philosophy, it may be feared that the exposition of the author is too brief to render him any satisfactory orientation.

Another detail which relates to the literary-historical treatment cannot be omitted. In following the historical development the reader is apt to lose the systematic unity of the whole. The arrangement which underlies this review is attributable to the reviewer. Of course, it could not have been expected that the author would pedantically cramp himself by this or any other arrangement; yet it would have been desirable if he had brought out more clearly than he has done the systematic points of view, whether in a foreword, or in his arrangement of chapter heads and summaries.

The scrupulous reading of the author and the quotations with which he makes his book useful appear in due moderation. With freedom from ostentation in his citations, which has made many a German book unen-

[41] [This study constitutes Pt. II of the present volume.]

durable, he employs notes which are necessary and serviceable, and with good taste and ability. That he should have made use of the German literature goes without saying; it is just this recourse to German science which has yielded advantageous results. The book shows a good deal of German thoroughness and Kantian earnestness. As it deserves, the literature of England is taken into account. The disregard of modern French literature is quite conspicuous. Tarde, for example, whose writings have attained at least equally as much fame as those of Maine, is invoked only once, and his history of philosophy [42] is entirely passed over. The reason for this is plain enough; the psychological positivism of the French is a thorn in the flesh to the critical disposition of the author.

It is more astonishing, however, that the author has not oftener made reference than he does to the works of Stammler. No legal philosopher of the day, it seems to me, stands as close to the critical tendencies of the author, as the Kantian Stammler. I do not have in mind here the work of Stammler dealing with the method of historical legal theory which the author frequently refers to; but I have in view rather the two leading works of Stammler.[43] The author, of course, is acquainted with these works, but it excites one's wonder that he has not more often made positive reference to them. This is not the first time that this observation

[42] See the critical dissent of *Groppali*, "La filosofia del diritto," pp. 243 seq., 286 seq. That elsewhere in Italy a keen interest is shown in the works of *Tarde*, is discovered by the able work of *Miceli*, "Le fonti del diritto," (1905); cf. my review in "Kritische Blätter für die gesammelte Sozialwissenchaften," I, 358 seq.

[43] ["Wirtschaft und Recht," and "Richtiges Recht." The translation of the latter work, as already indicated, appears in this series Since the date at which the reviewer writes, *Stammler* has published his "Theorie der Rechtswissenschaft."]

has intruded itself on my attention among Italian legal philosophers,[44] and I have looked in vain for a reason. Perhaps it may be, as a foreigner said to me in conversation, that the books of Stammler, on account of their style, offer special difficulties to the foreign reader.

So much may suffice. Fundamental criticism of the book under review would require a critical survey of position with reference to the Kantian theory of knowledge in general;[45] but it seems ill-advised to attempt this vast problem on the occasion of a book-review of prolegomena which are moreover themselves chiefly critical. Such discussion may await the author's promised solution of the problem.[46] For the same reason the question may be left unanswered as to whether criticism implies an affirmation of a so-called natural law which seems to be the view of the author.[47] This course seems all the more proper inasmuch as the author himself emphasizes that the problem of natural law — to which without apparent ground he devotes an entire chapter — is independent of the problem of defining the law.

[44] Cf. "Philosophische Wochenschrift," II, 61.

[45] To those who seek an introduction to the study of *Kant*, I never tire of recommending the classical little book of *August Stadler*, "Die Grundsätze der reinen Erkenntnistheorie in der Kantischen Philosophie" (1876), instead of the too finely written books of Cohen.

[46] [Prof. Segond's review which appears in the next appendix has been selected for the discussion of the work to which reference is made.]

[47] Kant himself was, in a strict sense, a proponent of natural law, and the works of modern Kantians show sympathy for natural law ideas. See my review of *Stammler*, "Richtiges Recht," in "Zeitschrift für Philosophie und Philosophische Kritik," 124, 234, and *Graf zu Dohna*, "Rechtswidrigkeit" in "Kritische Blätter für die gesammelte Sozialwissenschaften," I, 117.

# Second Appendix

## THE NEO-KANTIAN PHILOSOPHY OF LAW

# APPENDIX II

## THE IDEALISTIC AND NEO-KANTIAN RENAISSANCE OF THE PHILOSOPHY OF LAW [1]

BY J. SEGOND [2]

Giorgio Del Vecchio, professor of philosophy of law at the University of Bologna, re-published last year, with an important addition, the paper read by him in September of 1908 at the Third Congress of Philosophy held at Heidelberg, entitled "The Idea of a Science of Universal Law from a Comparative Point of View." Very interesting in itself, this paper presupposes, for an accurate understanding, an acquaintance with the prior works of Del Vecchio. The work of this author within his chosen field seems to us significant of the philosophical and idealistic renaissance which, originating in Germany, is, as we know, agitating contemporary Italy, and it seems worth while, in order to give a place to this movement in the more limited field of law, to study briefly its expression, both in the paper referred to above, and in two other essays by the same author, one on "I presupposti filosofici della nozione del diritto," [3] the other on "Il concetto della natura e il principio del diritto." [4]

[1] [A critique published in the "Revue philosophique de la France et de l'étranger," February, 1911, Vol. XXXVI, p. 168. — *Ed.*]

[2] [Professor of Philosophy at the Lyceum of Toulon, and lecturer on philosophy at the University of Aix-Marseille. Translated by LAYTON B. REGISTER, member of the Philadelphia Bar and Lecturer in the Law School of the University of Pennsylvania. — *Ed.*]

[3] Cf. Pt. I, pp. 1–124, ante. — *Tr.*

[4] Cf. Pt. III, pp. 219–335, ante. — *Tr.*

Italian philosophy was exemplified at the period of the "Risorgimento" by great metaphysicians such as Rosmini and Gioberti, and, in the work of Rosmini, was inspired by the ancient Pythagorean or Eleatic philosophy, as well as by that of Thomas Aquinas or by the thinkers of the Renaissance. It seemed only a few years ago finally consecrated to an integral positivism of purely scientific intent, freed from the agnosticism of Comte or Spencer, and inspired by the "patriarch" of Padua, Roberto Ardigò. And while the "Revista Filosofica" (edited until his death by Cantoni), represented, primarily, the tradition of Kantian criticism, the "Revista di Filosofia e scienze affini," altogether positivist and directly under the guidance of Ardigò, was very often accepted outside of Italy (at least in France), as more faithfully depicting the current view point of Italian thought. Several years ago, however, the French "Italianists" found that they must modify this impression. The doctrine, to be sure, of the romanticist-poet of Vicenza, Antonio Fogazzaro, the author of "I ascensioni umane" and of "Il Santo" — a doctrine Rosminian in its gnoseological and partially Darwinian in its scientific origin, and Franciscan in its mystic origin, — appeared perhaps insufficiently systematized, to certain minds or not sufficiently critical or (let us say) secular. Yet such names as that of Barzellotti, with other genuine and great philosophers and scholars, show clearly that critical inspiration and the Kantian systematization of knowledge have eminent and original exponents in contemporary Italy. Alongside this neo-critical revival, the spiritualistic and theistic tradition defends its rights, allying itself to the very minute positive studies of normal and pathological psychology or of experimental ethics, as is proved by the works of de Sarlo, of Aliotta, and others.

Regarded from the very modern point of view of the criticism of the sciences and of positive gnoseology, the Italian philosophy is represented in our day by the logico-mathematical work of Peano and of the lamented Vailati, and by the remarkable essays of Enriques, the president elect of the Congress of Bologna. But, it is particularly in Florence and Naples that the Italian philosophic renaissance has established its two centers of idealist propaganda.

The Florentine pragmatists — already grouped about Papini, the destroyer of idols and the prophet of the "twilight of the philosophers," — showed themselves in the publication of the "Leonardo," to belong to the empirical school of Mill, and to that yet more radical school of William James, while extolling the mathematical determination of phenomena as opposed to the panlogistic philosophy of nature, and while invoking the patronage of Leonardo da Vinci. Several of them gave evidence of religious affinities, and, championing the "veiled host," turned the "philosophy of action" of Maurice Blondel in a Hellenic direction. To-day, though they still possess an official mouthpiece, the periodical called "La Voce," their innovating ideas are chiefly given expression in a club of philosophical scholars at Florence. Recently, however, they have affirmed, in a forceful manifesto of revolt, their readiness to speculate "on the side."

The Neo-Hegelians of Naples, grouped about Benedetto Croce, also possess in the "Critica" an organ of their own; and in it they display their aggressive audacity. As adversaries of pragmatism, and as philosophers of the "Idea," they strive, in their systematic efforts, to give to Italian youth a genuinely philosophic culture. For this purpose they are producing little by little a collection of classics, in which, though the Germanic

influence dominates, the philosophy of Bruno and Vico are extolled no less than that of Hegel and Kant. As an editorial of the "Leonardo" of Florence once pointed out, this Naples school, in its hatred for empiricism, views with scant favor any subservience to Anglo-Saxon ideas, and seeks inspiration especially from the German idealistic tradition, with which it sometimes contrasts (as in the learned studies of Gentile) the gnoseological doctrines of the Italian philosophers of the "Risorgimento." And though Croce, the talented promulgator of this critical Hegelianism, has shown that a pseudo-philosophy of Nature is the dead centre of the doctrine of Hegel, he himself elaborates from an idealistic point of view a pure philosophy of Spirit; in a trilogy of essays he develops a formal theory of knowledge, intuitive and conceptual, theoretic and practical, holding the mathematical and natural pseudo-sciences as simple instruments of action, while avoiding all metaphysics. In other respects the two groups seem at one in their disdain for the philosophic instruction furnished the students of their country and for the official positivism of the disciples of Ardigò.

Now this aversion for positivism and this idealistic preoccupation are also found amongst the "professors of philosophy" themselves. One of them spoke to me with a certain irreverence, at Heidelberg, of the "patriarch" of Padua and of his "pupils." Besides, do not Gentile, the associate of Croce, and Calderoni, the Florentine pragmatist, both teach philosophy? But it seems that this pedagogical idealism, — doctrinal but not official — accords badly with both their pragmatic tendencies and their concealed empiricism, and with the Hegelian system and its pure concepts. Indeed, they would much prefer to present themselves as a realization, in present day Italy, of the return to Kant — understood

in an exact sense, as Del Vecchio acutely notes. Of this neo-Kantian theory of the knowledge of law and of this transcendental idealism — which demands the *positive* existence of a juridical "reality" having an exact and wholly experimental scientific method — Del Vecchio's essays offer us the scheme and show us the necessity.

## II

Just as the Kantian critique of mathematical and physical knowledge took as its starting point the *fact* of mere existence of the sciences of natural *phenomena*, so the neo-Kantian critique of juridical knowledge commences in the fact, recognized to-day by all, of the existence of a *phenomenology* of universal law. And it is to the determination of the prerequisites of this *comparative* science of juridical facts that Del Vecchio devoted his paper. He insisted upon this truth: that the possibility of the birth of such a science could no longer, in principle, be doubted; and that the very ease of its establishment might, by reason of the breadth of the subject and of the indefinite knowledge of primitive law (especially of prehistoric times), give rise to a problem, though, for that reason, the science should stimulate all the more the zeal of the jurists. He denounced the prejudices which still retard the realization of the program of this universal phenomenology, and which, even among the scholars who are responsible for this program, distort its true bases and falsely attribute an antiphilosophical signification to it. Among these prejudices he laid emphasis upon the illusion which attributes to the law of a particular time or people an exclusive or unique value; makes of the rules of this particular law universal norms of legal

reasoning; sets up the object of the investigation as the criterium of the investigation; and by narrowness of view renders itself incapable of comprehending the relativity of this particular phenomenon and its evolutionary position. He reminded us that Roman law particularly had long been profiting by this strange transfiguration from a European law, determinate and belonging to a simple historical category, into a universal and absolute law; and that this had come about through the instrumentality of the most diverse and mutually hostile schools of law, without excepting therefrom the German "historical school," whose illusions in this regard had been actually undermined by the "philosophical school" and the theorists of rational law in their criticisms of the prejudices of the theorists of *natural law*. He showed that this necessity for an entirely relativistic comparison between the institutions and customs of different peoples, even primitive ones, did not fit in with the didactic programs, and for this reason was given free rein in "the defective systematizations of that chaotic collection of facts and conjectures which constitutes so-called *sociology* and which is the sign of an ailment in contemporary civilization." Del Vecchio sees in this alleged science only "an organic body of methodological needs to be observed in the study of human phenomena," and has set himself the task of determining those rules of method with regard to juristic phenomenology and their relations to the philosophy of law.

The first of these "needs" consists in viewing positive law as a *natural phenomenon*, and for this very reason is bound to the whole of reality which experience presents to us; it is, therefore, not to be mixed with the presentation of facts which enter into considerations of a deontological order. The further need consists in adopting towards human phenomena the impartial attitude of

the *naturalist*; whence it follows both that no juristic institution could be adopted as the prototype of others, and that no institution could be despised as unethical or without meaning. Whence it follows, furthermore, that we must search for the origins and primitive phases of all institutions, even of those which we meet with in our experience in a finished form, since only a comparison between the phases of their development can disclose to us the meaning of their present phase *as a part of nature*. The existence of hidden survivals and of apparent exceptions renders this reconstruction possible, and is facilitated by the frequent analogies between that which appears abnormal in a given state of advanced civilization and that which, in a given state of primitive civilization, forms an integral part of an organic system.

To this generic prerequisite, applicable to all experimental research, must be added a specific prerequisite, applicable exclusively to juridical research, namely: the *logical* determination of the very *notion of law*, of that which gives distinctively a *juridical* character to phenomena. This universal logical form, this conceptual plan, transcends experience, since it comprehends all possible cases and constitutes the possible limit itself of any given juristic experience. Without such a plan there can be no grouping of phenomena of this order, no unity in the research, no homogeneous comparison of facts. "To recognize this all-important prerequisite is not to diminish the value of juridical data, but, in fact, to assure its authority in its special sphere."

In conformity with these rules there is formed an independent science of universal law, regarded from the comparative point of view. But such a science is only possible by reason of the postulate of *the unity of the human mind*. Every conscience carries within itself,

as it were, the "eternal seed" of what is just, which permits it to surmount empirical personality and to co-ordinate this by a moral relation to the personality of another. And positive law, the universal exteriorization of the subjective intellect, — though it passes only by degrees from the obscurest to the clearest forms of knowledge, though it consists at first of institutions produced by vague intuition and blind instinct — is, nevertheless, from the commencement (in the words of Vico) "of human creation" and produced by them "through the intelligence," — a fact which assures to it the quality of an incorporeal phenomenon. Now this juridical unity is not expressed alone by the universal existence of law; it manifests itself also in the resemblances which appear between the most diverse and independent manifestations of law. And the very evolution of juristic forms does not contradict this analogy, since such an evolution presents a ***human*** and general character in such a way that the substantial unity of the human mind is revealed throughout this development.

Juridical unity is shown also by the constant fact of the *communicability* of norms, — as where the law of one people (the Roman law, for example) may be assimilated by another, so that the very internal logic of juristic institutions assures them an "autonomous life" and (despite the historical basis of their origin), a signification that is universal and ***metahistorical***. The author lays stress upon the history of the doctrines relative to this communicability in a note which he adds to his original paper, emphasizing there the "empiricist" and "superficial" exaggeration of Gabriel Tarde, who, in his emphasis on imitation (often hypothetical), slighted the native and "autochthonous" similarity of developments.

The result is that the natural evolution of the law of each people tends to make those elements that are of a general and human character predominate (in the higher phases) over those that are individual or of a strictly national order. And this convergence of diverse juristic institutions forms, by its spontaneity and necessity, one of the aspects of the evolution of the human mind itself. Hence by serving as an effective instrument for this progressive unification of law, for this slow formation of a "societas generis humani," the *comparative science of universal law* is to be distinguished from the purely *chronological history of law*; and the distinction lies in the fact that the former reconstructs in the growth of the phenomenal world the absolute idea of justice and of right which conscience demands unconditionally and which reason demands upon teleological grounds. Thus comparative jurisprudence hangs upon a series of philosophic premises. The incompatibility which some have alleged to exist between this "empirical science" and the "philosophy of law" arises from the fact that the lowest forms of empiricism still subsist in the philosophy of law, though they have been finally banished from philosophy in general. And to prove this incompatibility purely imaginary it is enough to cite the name of a forerunner in this comparative science, Paul Anselm von Feuerbach, a disciple of Reinhold, a critical and Kantian rationalist, and a metaphysician bound to the absolute principle of justice as deduced from pure reason. Del Vecchio concludes finally "that the idea of a comparative science of universal law is in no wise bound by its nature to an empiricist conception of the philosophy of law, but is, on the contrary, from a double point of view, material and logical, evolved from a rational conception of this philosophy."

## III

The paper which has just been analyzed, proposes, then, to set forth the dependence, from the epistemological as well as from the teleological point of view, of *positive* jurisprudence upon transcendental, idealistic and neo-Kantian philosophy. The philosophical premises of this jurisprudence are, therefore, of two kinds. On the one hand, the comparative science of law presupposes a logical and *formalistic* concept of law, which shall assure the *unity* of the science. On the other hand, this comparative science, because it fixes by this definite aspect the fundamental unity of the human mind and rediscovers in the history of juridical phenomena the "meta-historical" forces of the realization of unity of mind, presupposes a *rational* "idea" of law, — no longer formalistic but creating a standard and an abstract criterium of valuation. It becomes necessary, therefore, to expound both a system of transcendental *canonics* of juridical knowledge and a system of transcendental *metaphysics*. To this double exposition Del Vecchio devotes the two other essays which we mentioned at the beginning; and it remains now to summarize from this double point of view the exposition which he himself offers us.

The *canonic* problem is almost exclusively treated in Del Vecchio's treatise upon "The Philosophical Presuppositions of the Notion of Law." The present crisis in the philosophy of law is first pointed out, not as an exceptional peril which might threaten the existence of this line of speculation, but as the present form of the premise upon which the very existence of such a philosophy depends. By its own definition such a philosophy is subject to a state of perpetual crisis; since its function is to co-ordinate and dominate juridical facts, and since,

therefore, every upheaval which occurs in the juridical consciousness requires a renewal of that effort of co-ordination.

But does not a preliminary question arise as regards the *definition* of law itself? If Kant could assert even in his day that jurists were still on the search for such a definition, and if the agreement of jurists in this respect is no more an actuality to-day, of what good has the research been? This question seems all the more pertinent, since intuition suffices to furnish sure marks of the recognition of the subject matter and to render the science possible. But Del Vecchio declares particularly that this important point is not the basis of the preliminary question. The object of the definition of law is not to assure immediate clearness to the subject matter, but rather to indicate its exact relations with other subjects, and, by separating its attributes, to permit the science of law to be built up as a science. In the absence of a satisfactory definition, a purely historical determination of the characteristics of positive law could do no more than disclose the variations thereof, — merely furnishing a proof of the necessary denial of natural law, and therein justifying (because of the relativity of juridical phenomena) that *scepticism* which, by its mere continuity, from Herodotus to the positive ethics of the present day, must perforce oppose our inevitable aspiration towards the science and towards a rational synthesis based upon deduction from complex historical law to a general and constant law.

Diverse methods have been attempted to satisfy this aspiration. Such was, for example, the rôle assigned long ago to the affirmation (realized indeed, in different systematic ways) of *natural law*. Psychological analysis shows that the ideal of an absolute justice forces itself upon our conscience. Gnoseological criticism, by deter-

mining the true sphere (exclusively rational) of natural law — by contrasting its purely deontological character with the existence in fact of positive law — by demonstrating that its *being* is confused with its *value* — allows us to repudiate the so-called positive negations of this ideal law as beside the point. But from the logical point of view the recognition of natural law, for the very reason that it constitutes a purely ideal criterium of valuation, could not insure the synthesis of law. The universal concept of law cannot be limited in its application to one particular system of law, but must extend to all systems and to all juridical forms, even to those merely possible. And in this is found a new proof of the distinction which is necessary between the *canonic* problem and the *metaphysical* problem of the presuppositions of law.

Juridical synthesis is no better assured, moreover, by the separation (clearly expressed by Aristotle and the Roman jurists as well as by Grotius) of the *general* from the *particular* and *accidental* elements in the history of law. Besides the fact that this theory tends to destroy the real character of natural and rational law by confusing it with the durable elements of positive law, it overlooks the reality, as phenomena, of the accidental elements which it eliminates, and it could not furnish a universal definition applicable to juridical phenomenology in its entirety.

The vain attempt has been made, from Plato to Vico, to unify the changing historical law by the establishment of a rule fixing the *order* of its modifications. A "history that shall be ideal and eternal" — such as the thesis of the "corsi" and "ricorsi" of Vico's "Scienza nuova" offers us — might indeed provide a scheme of "immobilization." This is the negation of historical movement, — of history itself, which, "made by men"

and representing the reign of the individual, constitutes a perpetual renaissance. It is the negation of progress, since it halts history within the circle of a rigid design and distorts the living reality. Whatever, therefore, may be the value of partial syntheses of the evolution of law, it is impossible to include historical law in its universality by a synthesis of this kind.

Would not the surest method of unifying historical law be, therefore, to determine the relations of the law of each period to the whole body of elements of social life? This method, which dates back in principle to Hippocrates, found its expression in the Middle Ages even in the work of Thomas Aquinas and in a remarkable passage of Dante. Though put into practice by Machiavelli (who was chiefly occupied in this respect with its political applications), it was, however, only in Vico and Montesquieu that the method, though still very imperfectly measuring up to the facts, became conscious of itself. That aspect of the "Scienza nuova" (as opposed to that of "eternal history") is the more important of the two; and the pregnant idea of Vico consists in the fact that he subordinated the external to the psychological circumstances of law, and saw in the law of each people an expression of the "genius" of that people. The eighteenth century economists were large contributors to the exact application of the relativistic method. This inclusion in the equation of all the social factors — as seen in the works of Turgot, Condorcet, and especially of Kant, exhibits the theory of *progress* in its *idealistic interpretation.*

The last thinker showed the law of progress to be a principle regulating juridical knowledge. By conciliating the empirical research for facts with this idealism, he found in the whole body of the history of law a gradual realization of reason, — an advance towards the final

ideal of pure justice. And though it has been possible to take exception to certain traces of metaphysics, in the thesis of progress, this regulating principle in phenomenological research is inevitable. To transform this study of social conditions into a pure phenomenological inquiry, and to suppress, consequently, every premise properly speaking founded on reasoning, was the work of the German historical school. It set the course of juristic speculation towards the present positivism, in spite of its early ties with the transcendental philosophy of the "becoming" (or rather of the "became") of Schelling and of Hegel.

But, most of all, this school anchored in the thought of the jurists (along with the idea of the interlocking of all social facts and of their character as a part of nature) the idea of capital importance (anticipated by Vico) of the *subordination* of these facts, and in particular of juridical phenomena, to the *collective intelligence*. Of this subordination Savigny was distinctly the interpreter. Thereafter came to be formulated, with respect to the science of law, an absolute *relativity* which was no longer merely sceptical but methodological. Since him, it is not the essence of law, which furnishes material for research; it is its history and function. But this banishment of the epistemological problem (which is simply an episode in the present reaction against ideology), leads to a disregard of a part of the data, — to a neglect of the uniformities which are encountered so frequently in the history of law, — to the failure to remember that it is the idea alone of a common juridical reasoning that gives a scientific meaning to the comparison of different juristic systems, — to the abandonment of that course towards a general law (human and no longer simply national) which is characteristic of progressive civilization. The fact of this uniformity alone, at once static

and dynamic, does not suffice to solve the canonic problem which has been raised; since human law, the ideal goal of juristic progress and identical in short with natural and rational law, is not the outcome of a concept applicable to all the realizations of law. The juristic unification sought after could not be found by the study of the substance of juridical thought, but only by the analysis of the form of this thought.

The distinction in logic between the *form* and the *substance*, — the affirmation of form in the sense of Aristotelian immanence and not of Platonic transcendence, — the modern position of the central philosophical problem of *innate ideas*, — the Kantian solution of this problem (by the determination of the element of form as a prerequisite, not in regard to time but in regard to understanding, and of experience possible as well as actual), — and hence the attribution to this "a priori" form, of the qualities of universality and necessity which are separated by an abyss from the qualities furnished by generalizations from experience, — all this dialectic deduction permits us to reach a *conceptual* definition of law. The claim of contemporary positivism to monopolize, while mutilating, the Kantian thesis, proceeds from the fundamental error of confusing actual with possible experience, of overlooking the qualitatively superior importance of the intelligible universality — inherent in sensible reality, but not exhaustible by it, since this universality constitutes the very prerequisite of and limit to all the virtualities of experience. The concept of the inherent and of the transcendental in law, is of itself indifferent to every definite juridical content. It is "a priori" logical, but not ontological (in the manner of the "Ideas" of Plato and of Hegel). And it is no criterium for the valuation of legal phenomena, answering the preliminary question, "quid jus?" but not

the particular question, "quid juris?" This concept alone furnishes the necessary principle for the scientific systematization and for the comparative history of juridical phenomena as a whole, since it determines, as a basis for the inquiry into these complex and variable phenomena, an immutable *essence* of law, the subject of a unifying category.

It is possible, henceforth, to appreciate, no longer in its relations to the content, but to the logical form of law, the value of *juristic empiricism*. When Kant affirmed the principle of the methodological necessity of this transcendental form, the knowledge of the history of law was as yet little developed. Especially from the speculative point of view they could not help clinging to the conceptual problem of the essence of law. But after the failure of its dogmatism (which was, moreover, vague, and of a social rather than strictly legal scope), just as after the failure of the Hegelian dogmatism by which it had been in part inspired, the result of the labors of the German "historical school" was to imbue the speculation of jurists with empiricism and pure "historicism." This explains the abandonment as to method of all research into the essence, and the positivist attempt to extract the concept of law from the data of experience alone. This paradoxical attempt comes from ignoring the inevitable exigencies of critical reflection. The world is our visualization, and as such is subject to the formal laws of our perception, which is the "organ of ideas." Therefore, "by an inherent necessity of thought, *law is law only by virtue of the ideal form which determines it, and nothing can be known as law unless it is in relation with that form.*" To attempt to wrest the concept of law from a generalization of juridical data, as the positivists claim to do, is to attribute to phenomena and the knowledge of phenomena an alogical character,—

to forget with inconsistency and ingratitude that this discovery of the notion in the facts presupposes an original logical synthesis, and that our recognition of the juridical nature of a phenomenon is simply retrospective.

It is the province, therefore, of the transcendental philosophy of law, and not of the empirical science of law, to deduce this fundamental notion. Of this universal and not purely idealistic definition of juridical phenomena, in its inexhaustible and necessary potentiality, *genetic* research can only furnish a crucial and partial verification. "The logical form of law is a primordial concomitant of reason, though its slow manifestation in the consciousness can be followed parallel to the historical development of the corresponding reality." This critical demand of an "a priori" form of law is in accord with the actual methods of the jurists themselves, who, more than any other class of scholars, make constant use of conceptual abstraction. But the universal concept which determines the essence of law, since it transcends the science of the jurists and belongs to philosophy has been neglected up to the present day by the jurists, — despite the recent efforts of the German "Allgemeine Rechtslehre" towards a synthesis, though even in this case these efforts are restricted to the law of a particular period. The elucidation of this concept should be the work of "those who have undertaken in our day to reclaim the philosophy of law from the fallacious doctrines of empiricism, thus relating this critical movement to that 'return to Kant' which is truly one of the characteristic signs of modern thought."

And this transcendental doctrine does not give rise to an empty *formalism*, since the formalistic concept of law expresses the law's true but purely logical essence; this, in experience, is endlessly refracted, facilitates

investigation of the content of experience, and finds in the actual analysis thereof its necessary complement. In short, this "reclamation" is directed not against "the positive or historical science of law, which is clearly legitimate as knowledge," but against "historicism raised to a philosophy."

## IV

The inquiry which we have just summarized, offers, in its transcendental nature, a purely *formalistic* solution of the special problem raised by the existence of juridical phenomenology. It remains to analyze "a priori" knowledge in order to disclose there the truly juridical conditions of experience. And this new determination, though the motive for its formation arose from a canonic necessity, could not remain shut within the domain of pure logic, nor even within the purely formalistic boundaries of the indeterminate possible. The task of philosophy, in the full sense of that term, should be an elucidation of the inherent "metaphysics" "of the human mind," a suggestion which we have seen indicated by Vico. And it is, in fact, by this reduction of complex data to the fundamental unity of a single principle that that "harmonious and complete vision of the universe" explanatory of empirical phenomenology itself may be finally realized. To this task, — that is to say, to this establishment of a systematic method of knowledge, centralized in the unifying notion (unifying in the absolute sense) of universe or of nature; which shall be superior to the pre-philosophical "presentation" of unsystematized phenomena; and which reflects one of the mind's innate needs, of which scepticism is simply a negative expression — to this task Del Vecchio devoted his metaphysical essay ("meta-

physical" still in the transcendental sense) upon "The Concept of Nature and the Essence of Law."

A complete systematization of empirical data, considered as nature, is furnished by the strict application to phenomena of the *principle of causation*. And the fact that this application is made manifest currently with the phenomenon observed does not authorize us to deduce such a principle from it; for as an indispensable condition of a scientific conception of nature and of the establishment of an unbroken chain of phenomena, the principle of causation constitutes, rather, an intrinsic necessity of thought, — a function of the intellect as "legislator of nature," according to the doctrine of Kant and Fichte. Besides, this systematization which science exacts is incomplete in that it does not permit of attaining, under pain of contradiction, either the beginning or end of the chain of phenomena, and in that it obliges the mind to presuppose a substantial substratum, an indestructible material or energy, — in its turn an essential of science and the object, too, of a "metaphysical" concept. It is incomplete, furthermore, in the sense that by determining the mechanical equation of phenomena, it converts qualitative into quantitative differences, and must appear proportionately less adequate as we try to apply it to the highest forms of existence. From this restriction it follows that the causative synthesis necessarily rejects every valuation of phenomena; that it discovers everywhere exclusively the natural and the normal; and that it excludes teleological conclusions even from the knowledge of human acts, as is shown in the type system of Spinoza. Such a conception is, moreover, legitimate in its universal extension. In all matters, methodological reduction from the arbitrary and accidental to the natural and determined constitutes progress in

science. Acts themselves, considered as natural phenomena, are necessarily determined and foreseeable.

But this legitimate and inevitable synthesis is not the only one that is actually and logically possible. The fact is that *teleological* systematization is not less legitimate and indispensable than mechanical synthesis. Aristotle's mistake lay not in attaching nature to final causes, but in leaving to one side the properly causative explanation, so as to limit himself to a valuation of phenomena, and in neglecting physics too much by reducing his work to a philosophy of nature. And Descartes' abandonment of teleology, prior to Leibniz and Kant, is explainable primarily as a reaction against this misuse. It cannot be objected to the synthesis based upon final causes that it proceeds *subjectively*, because the explanation based upon primal causes is also subjective. The two principles constitute two internal needs of thought. And we cannot with Kant limit the immediate application of finality to organic nature, or rather, exclude the world of life from the mechanical explanation. Both principles, considered as heuristic, are equally inevitable and unavoidable. But the teleological method, which permits us to observe the qualitative progress towards a higher form, — to embrace the whole of phenomena in its unity, — to perceive, as from within, the series of causes, — to evaluate hierarchically the modes of existence, — to distinguish the normal from the abnormal, — gives to the concept of nature a more complete ideal sense, seizes the reality (according to Hegelian philosophy) in the absolute spontaneity of its principle, and shows this to us in its rational and progressive organization and individualization, until it is raised to the level of intelligence and of a subject capable of reflecting upon itself. Thus "this concept of nature is philosophically superior, since it puts us into

direct and intimate relation with the reality of which we form a part, and since it reveals to us the profound identity of our being with universal being."

If man, from the mechanical point of view, forms part of nature, yet from another point of view, and because the world presupposes consciousness and ideas, considered as forms, that regulate consciousness, he sums up entire nature in himself; and reality is in its whole a function of the Ego. Thus the Ego, as the "organ of ideas" and not as an empirical personality, is *autonomous* in its subjectivity. Even though everything is determined in nature, and liberty is apparently abolished, yet liberty reappears triumphant the moment that the law of causation becomes an emanation *of* the subject. Objective gives way to subjective orientation of thought; the given fact ceases to be an original datum; subjectivity is no longer a negligible force, but the prerequisite itself of all possible reality. And this point of view, superior to others in theory, is the only admissible one in practice, since acts, which as physical phenomena are indifferent to any valuation, become objects of valuation by their relation to the subject as well as to their absolute principle. It is consequently in this relation that the ethics and the philosophy of law find their foundation. The absolute character of the person and the supremacy of the subject over the object is reflected in the supreme norm of practice, which bids man act as an autonomous being, as a rational and noumenal Ego, conscious of his essential identity with the being of all other subjects. It is this feature alone of the subjective and ultra-phenomenal essence of man that makes possible the *imperative*, presents an opportunity for decision, and imposes upon the subject the task of surmounting that crisis, and effecting a reconciliation between himself as a "being complete in himself" and his phenomenal existence as

"himself a part of being." Human acts from this point of view are no longer explainable simply by their empirical and natural relations, but are appraised as expressions of *liberty*. Thus, "the absolute elevation of the Ego above phenomena" is, in its entirety (as Kant teaches implicitly and Schelling explicitly) "the limit of theoretic philosophy and the principle of ethics."

The transcendental principle of action is defined in two forms: In so far as it is a question of a *subjective* relation of the Ego to itself, we have the *moral* principle of duty and of the *necessity* of the act; in so far as it is a question of an *objective* relation between subjects, we have the *juridical* principle of the *possibility* of the act and the *ability of compelling respect* on the part of another. The two laws are co-existent and equally categorical. The duty to act, as a principle, autonomous and universally valuable (considered legislatively), implies an inviolable prerogative of the person; the principle of law is deduced "a priori" from reason; it is not dependent upon facts; it exists prior to any application, and is of value to all men by virtue of its nature alone. Here is, then, not the purely formalistic concept of law, but the ideal serving as the measure and standard of the rationality of law, — positive in its content, in a word, *natural law*. In this way that moral scepticism is overcome which would be irresistible from the logical point of view of the concept without the aid of a criterium of valuation. In this way, too, the difference is reaffirmed between the two problems of the philosophy of law, the one canonic and formalistic, the other metaphysical and deontological.

The inaccurate and equivocal conceptions of *nature* have led the theorists of natural law to paralogisms which critical and Kantian idealism alone can remedy. The pseudo-historical character of conceptions of this

kind, and the confusion resulting from them between the primitive and the normative, explain the present positivist negation of natural law. But the transcendental conception robs these belated negations of their cause of existence. The neo-Kantian philosophy of law maintains in its entirety both the naturality of historical law and the supra-historical essence of natural law. By overcoming the confusion between the natural and the primitive, between causative explanation and valuation, it none the less admits of a finality in the evolution of primitive law, and it regards the juridical ideal of autonomy as the *limit* towards which positive law itself tends. "Criticism has taught us to distinguish the truth of the phenomenon from the truth of the ideal necessity which commands it, while offering us also the means of recognizing the gradual reconciliation of the two in history."

## V

The three essays of Del Vecchio which we have thus summarized briefly give a good presentation of the critical idealism by which he is inspired, in its double aspect, logical and metaphysical. The numerous citations which the work contains are witness to the author's desire to express in it, not his own feeling towards the rational prerequisites of juridical science, but rather a general *tendency* of philosophy, at once traditional and contemporary, — a tendency which he finds not only amongst the philosophers occupied with law, but also amongst the jurists themselves. We wish to indicate briefly, on the one hand, what are the philosophical doctrines with which his own doctrine presents conscious affinities, and, on the other hand, what is the relation that he himself would desire to see established between

the positive science of universal law and his own transcendental idealism.

The philosophical *tradition* defined by Del Vecchio is, as it were, staked out by the great idealistic doctrines of Aristotle, Vico, Leibniz, Kant, Fichte and Hegel. And for that reason, while one may well note the definite relation attaching his work to the principal "schools" of contemporary Italy (those of Padua, Florence and Naples), it is rather with the "philosophy of Spirit" of Croce and his neo-Hegelianism that we would, in fact, ally the work of Del Vecchio. To the anti-agnostic and anti-idealistic relativism of Ardigò, (though, indeed, he himself in no wise professes agnosticism), the *idealism* of Del Vecchio is expressly opposed. Positivism freed from all critical presuppositions, and affirming itself (by assuming the proof) as *pure* relativism, and pure historicism raised to a philosophy, — it is precisely these systems which Del Vecchio proposes to combat by his transcendental doctrine. As to the pragmatism of the "Leonardo," the constant sympathy of this current of thought with empiricism, the aversion which the associates of Papini (herein resembling William James) evidence for the Kantians and the Hegelians, their sarcasm with regard to the "a priori," the concept and philosophical systematization, — all these features seem to mark off their negative and radical critique from the doctrinal and positive critique of Del Vecchio.

But the Hegelianism of Croce cannot, however, claim Del Vecchio as one of its disciples. Though he, too, is persuaded that the only knowledge wholly admissible is that which, by being philosophical and not simply naturalistic, presents an absolute character and is associated with the pure "idea," — though it seems to us, moreover, that this doctrine cannot be contrasted with that of Croce, on the ground that he himself definitely

rejects the Hegelian thesis of the impelling force imparted to "ideas" (for Croce in repudiating the Hegelian philosophy of nature rejects, we believe, this thesis, seeing in it a pseudo-philosophical affirmation even of the "naturalistic"), nevertheless a radical opposition is apparent between the doctrine of the neo-Hegelians and that of Del Vecchio by the distinction upon which he deliberately insists between the *concept* and the *ideal.* By this distinction of principle, indeed, he contrasts the world of "values" with the world of "essences." He contrasts the *practical* problem of making a decision in a given instance with the entirely *theoretical* task of defining the universal form. He determines the very notion of the "rational " in an original fashion as the realization of the "ought to be" and not simply the hypostasization of the "becoming."

And while he shows in repeated passages his appreciation of the German historical school of Savigny and Hugo, and points out in the historicism of this school the influence exercised by the Hegelian philosophy and the emphasis which it wished to impart to the universal and impartial "rationality" of all becoming, "per se" — is it not also the neo-Hegelianism of Naples which is hit by this criticism? And cannot the objection be raised against him equally that, by the "becoming" which he rationalizes, since he refuses to see in it the progressive realization of a practical and rational task, he, in fact, legitimatizes and rationalizes exclusively the "became?" And if by reason of this contrast, — by this teleology of nature, — by this supreme importance attributed to the world of "values," Del Vecchio approaches pragmatism, in a measure, yet it is as a rationalist that he would understand this tendency; and his teleology, truly anti-empirical in principle, shows essential agreement with that of Fichte and that of Kant alone. The

"transcendental idealism," the "renaissance" of which we have remarked in the significant work of this philosopher of juridical thought, is truly, in this sense, a neo-Kantism.

This neo-Kantian quality of Del Vecchio's doctrine determines the relation of his idealism to the positive science of law. While positivist empiricism exalts the study of phenomena at the expense of conceptual forms, putting all knowledge under the measure of time and history, and while, on the other hand, neo-Hegelian idealism exalts the pure concept at the expense of phenomena by refusing to recognize true concepts in the laws of nature and true knowledge in the naturalistic or even in the mathematical sciences, yet transcendental idealism affirms (according to the Kantian thesis) both the empirical realism of the natural sciences and the value, independent of time and metahistorical, of the pure conceptual forms. Hence the necessary relation between the philosophical science of concepts, and the positive and historical science of law. Empiricism, because it sees in essence nothing but generalizations, could never discover, beneath and beyond the variations in positive law, the changeless and universal character of law; it thus fails to give juridical learning the unifying principle indispensable to it, and opposes to those jurists who, by that necessary hypothesis of a rational and constant juridical essence, determine in practice a comparative and universal juridical phenomenology. Neo-Hegelian idealism, because it sees in pure concepts something else than the inexhaustible and rational potentiality progressively realized by historical law, and because by its denial of the rationality of juridical phenomenology, it abolishes the relation between the essences and positive determinations, condemns itself, therefore, to remain a vain

philosophy of form, and does not permit of the justification of the comparative science of law, since it does not regard the concept as the unifying principle of scientific usage. On the other hand, because transcendental idealism makes essences that are absolute and in no wise empirical generalizations out of conceptual forms, and because it sees in these rational forms inexhaustible potentialities inherent in the natural realization of the aspects of positive law, — transcendental idealism thus maintains the universality of pure law, changeless because wholly logical and nowise temporal, and maintains as well the rationality of the varying aspects of historical law, in the concept of which it discloses the unifying principle and the truth of the phenomenology of that universal law which determines specifically the partial realizations of pure law and of its inexhaustible potentialities. The naturalistic and mechancial explanation of positive and actual law, by scientific application of the metaphysical law of causality, does not at all furnish the unity of this law, if its successive moments and its substance are under consideration. But, if its constitutive and essential form can be examined, the unity of positive law appears as a necessity; and to this prerequisite, exclusively, the comparative and natural science of law owes its possibility. Plainly the transcendental method, therefore, is seen to be the one faithfully followed by the neo-Kantian juridical idealism, and assures for it an incomparable superiority over positivism and neo-Hegelianism. The fact of juristic knowledge and the reality of positive law, in their common existence, are both subject to this necessary prerequisite of all possible juridical experience, — the limiting concept of pure rational law.

But neo-Kantian idealism lays down as necessary a double principle, because, as has been explained, it

opposes to the world of essences the world of values. In this, too, it is faithful to the transcendental method by which it is inspired. To place the position of the practical problem and of the realization of the juridical "ought-to-be" in opposition to the (dynamic no less than static) explanation by historical causality, (subordinated, however, to the universal concept), is to apply to the question of law the general opposition formulated by Kantian idealism between the problem of theoretic reason and transcendental knowledge of the existent and the problem of practical reason and transcendental legislation of action. And just as Kantian idealism followed up the synthesis of the two kinds of reason by reducing the principles of form to the activity of the transcendental Ego, so also neo-Kantian juridical idealism for gnoseological reasons determines the Ego, whom it declares to be the necessary primate of nature, as the common and transcendental source of the science of positive law and of the realization of natural law.

No doubt, just as knowledge in general is conceivable from the Kantian point of view, by reason of the synthetic activity of the Ego and the constitutive forms of that activity, without postulating the ought-to-be and the practical problem, so juridical science would be conceivable from the neo-Kantian point of view, by reason of the pure form of law — a principle of the causative and historical explanation of law, — without finding it necessary to postulate here either the practical problem of the juridical "ought-to-be," the necessity of the opportunity for decision, and the necessary realization of ideal and natural law. This is just what Del Vecchio points out when he declares that, from the pure logical point of view, the forces of historical law are indifferent so far as the question of their value is concerned. But did not Kant's idealism already indicate, though incom-

pletely, the co-existence of the mechanical explanation and of the teleological attitude? And in its doctrine of the noumenon, did it not tend to subordinate the mechanism of nature and science to the expressed finality of the autonomous Ego? While Kant saw in the teleological principle a heuristic rule as regards positive research, he himself (as Del Vecchio proves) applied this same heuristic principle to historical knowledge of existing law. And since the science of comparative law reveals similarities which do not spring from imitation, — since the characteristics of complex law converge little by little towards the unity of human and rational law, — since the law of progress correctly expresses a heuristic rule favorable to historical research into the phases of positive law, it is vain to disassociate the logical necessity of the notion defining essence and the teleological necessity of the ideal defining values. It is indeed the positive science of existing law, made subject to the concept of the juridical essence which leads to the formulation of the hierarchy of values and the necessity of the ideal. Thus the teleology of law, quite as well as the causative explanation of law, is conformable to the transcendental and Kantian method. Nay more, does not the inexhaustible feature of the juridical essence already imply the contrast between the rational subject, creator of the possible, and the phenomenon which is simply existent? This implied contrast, which the logical position of the idealistic problem necessarily included is cleared up by the doctrine of the primacy of the Ego in relation to nature — a doctrine which corresponds to the metaphysical position of this problem. It is, therefore, in entire fidelity to the method consciously proclaimed by him that Del Vecchio has in this work — to us significant of a new philosophic tendency — followed up this attempt at an idealistic

justification of a positive science of universal law with the formulation of an absolute juristic criterium.

What is here important is, indeed, this neo-Kantian tendency. Is it not the conception of a world of *values* that dominates in this new philosophy of law? The difficulties of the original philosophy of Kant diminish when, by limiting the notion of the actual to that which is in fact realized, we regard the noumenal world from a practical point of view as a system of values, and, therefore, as a rational principle of potential realizations. And since this very world of essences offers the system of potentialities which historical phenomena will realize only partially (actuated as it will be by the pursuit of a better), does it not present for this very reason, to the scholar who unifies the development of phenomena and studies their progress, a value of truth, — wholly formalistic in appearance, but unfolding itself by the comparison of successive elements of the empirical substance, and their relative evaluation?

This is saying that the logical problem of the idealistic philosophy of law is itself impliedly of teleological nature. But it is also saying, perhaps, that a new research into this notion of a "world of values" would still further deprive them of the ontological character which they owe to the really Kantian origin of the doctrine; that such a research would definitely resolve into "ought-to-be" the necessity and the universality and the exhaustless potentiality which characterize them; that it would determine their alleged "timelessness" as absolute immanence and creative potentiality. By this critique, (still more radical and more in accord, it would seem, with its own spirit), the transcendental idealism of the neo-Kantians would draw away from the neo-Hegelian dialectic. Abandoning the rigid forms raised to entities and the absolute Ego determined as being, it would

approach Pragmatism; whose proper function is, indeed, to substitute for the reign of essences and for the idolatry of conceptual forms the reign of values — to substitute for the affirmation of the became or the fixed, the valuation of the "becoming."

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